UNITED STATES REPORTS

VOLUME 515

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1994

MAY 30 THROUGH SEPTEMBER 29, 1995

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

284 U. S. 149, line 16: "1050" should be "1049".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

RETIRED

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WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
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*Chief Justice Burger, who retired effective September 26, 1986 (478 U. S. VII), died on June 25, 1995. See *post*, p. V.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. vi, 509 U. S., p. v, and 512 U. S., p. v.)

DEATH OF CHIEF JUSTICE BURGER

Supreme Court of the United States

MONDAY, JUNE 26, 1995

Present: Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, and Justice Breyer.

The Chief Justice said:

As we open this morning, I announce with sadness that our friend and colleague Warren Earl Burger, former Chief Justice of this Court, died yesterday in the early morning, at Sibley Hospital in Washington, D. C.

He was born in St. Paul, Minnesota, in 1907. He was a self-made man. Not having the finances to attend college full time he sold insurance during the day to pay his way through night school. He spent two years at the University of Minnesota and then graduated with honors four years later from the Mitchell College of Law, formerly the St. Paul College of Law.

His remarkable professional career began with a long tenure at a private firm in St. Paul where he specialized in civil and administrative practice. While in private practice, he made time to be an adjunct professor of contracts and actively participated in local civic and political organizations. In 1953, President Eisenhower appointed him to the Department of Justice as an Assistant Attorney General in charge of the Civil Division. A few years later, he was nominated to the United States Court of Appeals for the District of Columbia Circuit, where he served for 13 years until his appointment as Chief Justice of the United States by President Nixon in 1969.

He served as Chief Justice for 17 years and will long be remembered as a major contributor to the decisional law of this Court. He was also an innovative reformer of the administration of justice. As appellate judge he had helped establish the Appellate Judges' Seminar at New York University and later cochaired an eight-year study for the ABA on standards of criminal justice. As Chief Justice, he reduced the time for oral arguments in our own Court from two hours to one hour, he introduced modern technology to the processing of opinions, he changed our straight bench into a bench with its current wings, and he helped found the Supreme Court Historical Society. For the judicial system as a whole, he helped create or sponsor, a series of institutions to foster more efficient ways to do justice in the nation's courts. These included the Institute for Court Management, the National Center for State Courts, the state-federal judicial councils, the expansion of the Federal Judicial Center, and the annual Brookings Seminars at which leaders of the three branches met to discuss judicial reform.

Following his retirement as Chief Justice in 1986, he continued his commitment to public service and devoted large amounts of his time to the Chairing of the Commission on the Bicentennial of the United States Constitution. And as a result of his efforts as chairman of that Commission, millions and millions of people who were previously unacquainted with the United States Constitution became acquainted with it.

The members of the Court will greatly miss Chief Justice Burger's energy and warmth, and I speak for all of them in expressing our profound sympathy to his son Wade, his daughter Margaret Mary, his grandchildren, and to all those whose lives were touched by this remarkable man and his wife Vera, who died last year. The recess the Court takes today will be in his memory. At an appropriate time, the traditional memorial observance of the Court and Bar of the Court will be held in this Courtroom.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1994

NEBRASKA *v.* WYOMING ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 108, Orig. Argued March 21, 1995—Decided May 30, 1995

A 1945 decree rationing the North Platte River among users in Wyoming, Nebraska, and Colorado enjoins Colorado and Wyoming from diverting or storing water above prescribed amounts on the river's upper reaches; sets priorities among Wyoming canals that divert water for the use of Nebraska irrigators and federal reservoirs; apportions the natural irrigation-season flows of the river's so-called "pivotal reach" between Nebraska and Wyoming; and authorizes any party to apply to amend the decree for further relief. *Nebraska* v. *Wyoming*, 325 U. S. 589. Nebraska sought such relief in 1986, alleging that Wyoming was threatening its equitable apportionment, primarily by planning water projects on tributaries that have historically added significant flows to the pivotal reach. After this Court overruled the parties' objections to the Special Master's First and Second Interim Reports, *Nebraska* v. *Wyoming*, 507 U. S. 584, Nebraska and Wyoming sought leave to amend their pleadings. The Master's Third Interim Report recommended that Nebraska be allowed to substitute three counts of its Amended Petition and that Wyoming be allowed to substitute three of its proposed counterclaims and four of its proposed cross-claims. Wyoming has filed four exceptions to the Master's recommendations and Nebraska and the United States a single (and largely overlapping) exception each.

Held: The exceptions are overruled. Pp. 8–23.

(a) The requirement of obtaining leave to file a complaint in an original action serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely to see whether they would take the litigation beyond what the Court reasonably anticipated when granting leave to file the initial pleadings. As the decree indicates, the litigation here is not restricted solely to enforcement of rights determined in the prior proceedings. However, while the parties may ask for a reweighing of equities and an injunction declaring new rights and responsibilities, they must make a showing of substantial injury to be entitled to relief. The Master duly appreciated these conclusions when considering the proposed amendments to the pleadings. Pp. 8–9.

(b) Wyoming takes exception to the Master's recommendation that it be denied leave to file its First Amended Counterclaim and Cross-Claim, which allege that Nebraska and the United States have failed to recognize beneficial use limitations on diversions of canals and that Nebraska has violated the equitable apportionment by demanding natural flow and storage water from sources above Tri-State Dam for use below the dam. However, by seeking to replace a proportionate sharing of the pivotal reach's natural flows with a scheme based on the beneficial use requirement of the pivotal reach irrigators, presumably to Wyoming's advantage, Wyoming in reality is calling for a fundamental modification of the scheme established in 1945, without alleging any change in conditions that would arguably justify so bold a step. Pp. 9–11.

(c) The Master's intention to consider a broad array of downstream interests and to hear evidence of injury not only to downstream irrigators, but also to wildlife and wildlife habitat, when passing on Nebraska's request that the decree be modified to enjoin Wyoming's proposed developments on the North Platte's tributaries does not, as Wyoming argues in its exception, run counter to this Court's denial of two of Nebraska's earlier motions to amend. Those earlier claims sought to assign an affirmative obligation to protect wildlife, while, here, the effect on wildlife is but one equity to be balanced in determining whether the decree can be modified. Moreover, Nebraska is seeking not broad new apportionments, but only to have discrete Wyoming developments enjoined. If its environmental claims are speculative, Nebraska will not be able to make the necessary showing of substantial injury. Pp. 11–13.

(d) Nebraska's allegations that Wyoming's actions along the Horse Creek tributary threaten serious depletion of return flows, with injury to Nebraska's interests, describe a change in conditions sufficient, if proven, to warrant the injunctive relief sought. Thus, Wyoming's exception to the Master's recommendation that Nebraska be allowed to proceed with its challenge cannot succeed. Pp. 13–14.

(e) Nebraska's allegation that Wyoming's increased groundwater pumping threatens substantial depletion of the river's natural flow also describes a change in conditions posing a threat of significant injury.

In excepting to the Master's recommendation that the claim go forward, Wyoming asserts that Nebraska's failure to regulate groundwater pumping within its own borders precludes Nebraska from seeking pumping limitations in Wyoming. However, Wyoming alleges no injury to its interests caused by the downstream pumping, and the effect that any such injury would have on the relief Nebraska is seeking is a question for trial. Pp. 14–15.

(f) Both the United States and Nebraska take exception to the recommendation that Wyoming's Fourth Amended Cross-Claim—which alleges that federal management of reservoirs has contravened state and federal law as well as contracts governing water supply to individual users—be allowed to proceed. Although the 1945 decree did not apportion storage water, a predicate to that decree was that the United States adhered to beneficial use limitations in administering storage water contracts. Wyoming's assertion that the United States no longer does so, and that this change has caused or permitted significant injury to Wyoming interests, states a serious claim that ought to go forward. This claim arises from the decree, and thus cannot be vindicated in district court litigation between individual contract holders and the United States. Nor is it likely that this proceeding will be overwhelmed by the intervention of individual storage contract holders. Since a State is presumed to speak for its citizens, requests to intervene will be denied absent a showing, unlikely to be made here, of some compelling interest not properly represented by the State. Pp. 15–22.

Exceptions overruled.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined, and in Parts I, II, and III of which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 23.

Richard A. Simms, Special Assistant Attorney General of Nebraska, argued the cause for plaintiff. With him on the briefs were *Don Stenberg*, Attorney General, *Marie C. Pawol*, Assistant Attorney General, *James C. Brockmann*, and *Jay F. Stein*.

Dennis C. Cook, Special Assistant Attorney General, argued the cause for defendant State of Wyoming. With him on the briefs were *Joseph B. Meyer*, Attorney General, *Larry Donovan*, Senior Assistant Attorney General, *Donald*

M. Gerstein, Assistant Attorney General, and *Raphael J. Moses* and *James R. Montgomery,* Special Assistant Attorneys General. *Timothy M. Tymkovich,* Solicitor General, argued the cause for defendant State of Colorado. With him on the brief were *Gale A. Norton,* Attorney General, *Stephen K. Erkenbrack,* Chief Deputy Attorney General, and *Wendy C. Weiss,* First Assistant Attorney General.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Days, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, Andrew F. Walch,* and *Patricia L. Weiss.**

JUSTICE SOUTER delivered the opinion of the Court.

Since 1945, a decree of this Court has rationed the North Platte River among users in Wyoming, Nebraska, and Colorado. By petition in 1986, Nebraska again brought the matter before us, and we appointed a Special Master to conduct the appropriate proceedings. In his Third Interim Report on Motions to Amend Pleadings (Sept. 9, 1994) (hereinafter Third Interim Report), the Master has made recommendations for rulings on requests for leave to amend filed by Nebraska and Wyoming. We now have before us the parties' exceptions to the Master's report, each of which we overrule.

I

The North Platte River is a nonnavigable stream rising in northern Colorado and flowing through Wyoming into Nebraska, where it joins with the South Platte to form the Platte River. In 1934, Nebraska invoked our original jurisdiction under the Constitution, Art. III, § 2, cl. 2, by suing Wyoming for an equitable apportionment of the North Platte. The United States had leave to intervene, Colorado was impleaded as a defendant, and the ensuing litigation culminated in the decision and decree in *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945) *(Nebraska I).*

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*Briefs of *amici curiae* were filed for the Basin Electric Power Cooperative by *Edward Weinberg, Richmond F. Allan, Michael J. Hinman,* and *Claire Olson;* and for the Platte River Trust by *Abbe David Lowell.*

We concluded that the doctrine of prior appropriation should serve as the general "guiding principle" in our allocation of the North Platte's flows, *id.*, at 618, but resisted an inflexible application of that doctrine in rendering four principal rulings. *Ibid.* First, we enjoined Colorado and Wyoming from diverting or storing water above prescribed amounts, meant to reflect existing uses, on the river's upper reaches. *Id.*, at 621–625, 665–666. Second, we set priorities among Wyoming canals that divert water for the use of Nebraska irrigators and federal reservoirs, also in Wyoming, that store water for Wyoming and Nebraska irrigation districts. *Id.*, at 625–637, 666–667. Third, we apportioned the natural irrigation-season flows in a stretch of river that proved to be the principal focus of the litigation (the "pivotal reach" of 41 miles between the Guernsey Dam in Wyoming and the Tri-State Dam in Nebraska), allocating 75 percent of those flows to Nebraska and 25 percent to Wyoming. *Id.*, at 637–654, 667–669. Finally, we held that any party could apply for amendment of the decree or for further relief. *Id.*, at 671 (Decree Paragraph XIII). With the parties' stipulation, the decree has since been modified once, to account for the construction of the Glendo Dam and Reservoir. *Nebraska* v. *Wyoming,* 345 U. S. 981 (1953).

Nebraska returned to this Court in 1986 seeking additional relief under the decree, alleging that Wyoming was threatening its equitable apportionment, primarily by planning water projects on tributaries that have historically added significant flows to the pivotal reach. We granted Nebraska leave to file its petition, 479 U. S. 1051 (1987), and allowed Wyoming to file a counterclaim, 481 U. S. 1011 (1987).

Soon thereafter, Wyoming made a global motion for summary judgment, which the Master in his First Interim Report recommended be denied. See First Interim Report of Special Master, O. T. 1988, No. 108 Orig. After engaging in discovery, Nebraska, Wyoming, Colorado, and the United States all filed further summary judgment motions. In his Second Interim Report, the Master recommended that we grant the motions of the United States and Nebraska in part, but that we otherwise deny summary relief. See Second Interim Report of Special Master on Motions for Summary Judgment and Renewed Motions for Intervention, O. T. 1991, No. 108 Orig. We overruled the parties' exceptions. *Nebraska* v. *Wyoming,* 507 U. S. 584 (1993) *(Nebraska II).*

Nebraska and Wyoming then sought leave to amend their pleadings, and we referred those requests to the Master. The Amended Petition that Nebraska seeks to file contains four counts. Count I alleges that Wyoming is depleting the natural flows of the North Platte and asks for an injunction against constructing storage capacity on the river's tributaries and "permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries." App. to Third Interim Report D–2 to D–7. Count II alleges that the United States is operating the Glendo Reservoir in violation of the decree and seeks an order holding the United States to the decree. *Id.,* at D–7 to D–8. Count III alleges that Wyoming water projects and groundwater development threaten to deplete the Laramie River's contributions to the North Platte, and asks the Court to "specify that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the [pivotal] reach, 75% to Nebraska and 25% to Wyoming, and [to] enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River . . . ." *Id.,* at D–8 to D–12. Count IV seeks an equitable apportionment of the North Platte's nonirrigation season flows. *Id.,* at D–12 to D–16. The Master recommended that we allow Nebraska to substitute the first three counts of its Amended Petition for its current petition, but that we deny leave to file Count IV. Neither Nebraska nor the United States has excepted to the Master's recommendation, whereas Wyoming has filed three exceptions, set out in detail below.

Wyoming proposes to amend its pleading with four counterclaims and five cross-claims. The First Counterclaim and Cross-Claim allege that Nebraska and the United States have failed to recognize beneficial use limitations on diversions by Nebraska canals, and that Nebraska (with the acquiescence of the United States) has violated the equitable apportionment by demanding natural flow and storage water from sources above Tri-State Dam and diverting them for use below Tri-State Dam. App. to Third Interim Report E–3 to E–6, E–8 to E–10. Wyoming's Second and Third Counterclaims and Cross-Claims seek enforcement or modification of Paragraph XVII of the decree, which deals with the operation of the Glendo Reservoir and is also the subject of Count II of Nebraska's Amended Petition. *Id.*, at E–6 to E–7, E–10 to E–11. By its Fourth Counterclaim and Fifth Cross-Claim, Wyoming asks the Court to modify the decree to leave the determination of carriage (or transportation) losses to state officials under state law. *Id.*, at E–7 to E–8, E–12. Finally, Wyoming's Fourth Cross-Claim alleges that the United States has failed to operate its storage reservoirs in accordance with federal and state law and its own storage water contracts, thus upsetting the very basis of the decree's equitable apportionment. *Id.*, at E–11 to E–12.

The Master recommended that we allow Wyoming to substitute its Second through Fourth Counterclaims and its Second through Fifth Cross-Claims for its current pleadings, but that we deny leave to file Wyoming's First Counterclaim and Cross-Claim insofar as they seek to impose a beneficial use limitation on Nebraska's diversions of natural flow. The United States and Nebraska except to the recommendation to allow Wyoming to file its Fourth Cross-Claim. Wyoming excepts to the Master's recommended disposition of its First Counterclaim and Cross-Claim. In all, then, Wyoming has filed four exceptions to the Master's recommendations and the United States and Nebraska a single (and largely overlapping) exception each.

II

We have found that the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, Rule 15(a); *Foman* v. *Davis*, 371 U. S. 178, 182 (1962), does not suit cases within this Court's original jurisdiction. *Ohio* v. *Kentucky*, 410 U. S. 641, 644 (1973); cf. this Court's Rule 17.2. The need for a less complaisant standard follows from our traditional reluctance to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, our jurisdiction is exclusive. *Mississippi* v. *Louisiana*, 506 U. S. 73, 77 (1992) ("'The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign,'" quoting *Texas* v. *New Mexico*, 462 U. S. 554, 571, n. 18 (1983)); *New York* v. *New Jersey*, 256 U. S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence"). Our requirement that leave be obtained before a complaint may be filed in an original action, see this Court's Rule 17.3, serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings. See *Ohio* v. *Kentucky*, *supra*, at 644.

Accordingly, an understanding of the scope of this litigation as envisioned under the initial pleadings is the critical first step in our consideration of the motions to amend. We have, in fact, already discussed the breadth of the current litigation at some length in reviewing the Special Master's First and Second Interim Reports, *Nebraska II*, 507 U. S., at 590–593, where we concluded that this litigation is not restricted "solely to enforcement of rights determined in the prior proceedings," *id.*, at 592. To the contrary, we observed that in Paragraph XIII of the decree, we had retained jurisdiction "to modify the decree to answer unresolved questions and to accommodate 'change[s] in conditions'—a phrase sufficiently broad to encompass not only changes in water supply, . . . but also new development that threatens a party's interests." *Id.*, at 591, citing *Nebraska I*, 325 U. S., at 620. The parties may therefore not only seek to enforce rights established by the decree, but may also ask for "a reweighing of equities and an injunction declaring new rights and responsibilities . . . ." 507 U. S., at 593. We made it clear, however, that while "Paragraph XIII perhaps eases a [party's] burden of establishing, as an initial matter, that a claim [for modification] is 'of that character and dignity which makes the controversy a justiciable one under our original jurisdiction,'" *ibid.*, quoting *Nebraska I*, *supra*, at 610, the "[party] still must make a showing of substantial injury to be entitled to relief," 507 U. S., at 593.

We think the Master appreciated these conclusions about the scope of this litigation when he assessed the proposed amendments to pleadings to see whether they sought enforcement of the decree or plausibly alleged a change in conditions sufficient to justify its modification. See Third Interim Report 33–36. The parties, of course, do not wholly agree with us, as they indicate by their exceptions, to which we turn.

III

A

Wyoming's First Amended Counterclaim alleges that "Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree . . . ." App. to Third Interim Report E–4. Wyoming's First Amended Cross-Claim alleges that the United States "has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to deliver natural flow water for diversion by Nebraska irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the lands entitled to water from those canals under the Decree . . . ." *Id.*, at E–8. The Master recommended that we deny leave to inject these claims into the litigation, concluding that Wyoming's object is to transform the 1945 apportionment from a proportionate sharing of the natural flows in the pivotal reach to a scheme based on the beneficial use requirements of the pivotal reach irrigators. Third Interim Report 55–64. Wyoming excepts to the recommendation, claiming that its amendments do no more than elaborate on the suggestion made in the counterclaim that we allowed it to file in 1987, that Nebraska irrigators are wasting water diverted in the pivotal reach. But there is more to the amendments than that, and we agree with the Master that Wyoming in reality is calling for a fundamental modification of the settled apportionment scheme established in 1945, without alleging a change in conditions that would arguably justify so bold a step.

In *Nebraska II* we rejected any notion that our 1945 decision and decree "impose absolute ceilings on diversions by canals taking in the pivotal reach." 507 U. S., at 602. We found that although the irrigation requirements of the lands served by the canals were calculated in the prior proceedings, those calculations were used to "determin[e] the appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually or cumulatively." *Ibid.* This was clearly indicated, we observed, by the fact that "Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit." *Id.*, at 603, citing *Nebraska I, supra,* at 667.

These conclusions about our 1945 decision and decree expose the true nature of Wyoming's amended claims. Simply put, Wyoming seeks to replace a simple apportionment scheme with one in which Nebraska's share would be capped at the volume of probable beneficial use, presumably to Wyoming's advantage. Wyoming thus seeks nothing less than relitigation of the "main controversy" of the 1945 litigation, the equitable apportionment of irrigation-season flows in the North Platte's pivotal reach. See 325 U. S., at 637–638. Under any circumstance, we would be profoundly reluctant to revisit such a central question supposedly resolved 50 years ago, and there can be no temptation to do so here, in the absence of any allegation of a change in conditions that might warrant reexamining the decree's apportionment scheme. Wyoming's first exception is overruled.[1]

B

Counts I and III of Nebraska's Amended Petition would have us modify the decree to enjoin proposed developments by Wyoming on the North Platte's tributaries, see App. to Third Interim Report D–4 to D–6, D–9 to D–11, on the theory that these will deplete the tributaries' contributions to the mainstem, and hence upset "the equitable balance of the North Platte River established in the Decree," *id.*, at D–5, D–10. Wyoming's second exception takes issue with the Master's stated intention to consider a broad array of downstream interests in passing on Nebraska's claims, and to hear evidence of injury not only to downstream irrigators, but also to wildlife and wildlife habitat. Third Interim Report 14, 17, 19, 26.

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[1] The Master explicitly noted that his recommendation should not be understood as foreclosing Wyoming from litigating discrete matters captured within its First Amended Counterclaim and the First Amended Cross-Claim that do not involve relitigation of the 1945 decision but rather go to the enforcement of the decree. Third Amended Report 63. Specifically, these matters include Wyoming's claim that Nebraska has circumvented the decree by calling for upstream flows for the use of irrigators diverting water below the Tri-State Dam; Wyoming's claim of waste by pivotal reach irrigators offered as a defense to Nebraska's objections to Wyoming uses upstream; and Wyoming's claim that Nebraska canal calls and natural flow diversions by the United States contravene priorities established in Paragraph IV of the decree. *Id.*, at 63–64. Neither the United States nor Nebraska has objected to the Master's recommendation in this respect.

Consideration of this evidence, Wyoming argues, would run counter to our denial of two earlier motions to amend filed by Nebraska: its 1988 motion, 485 U. S. 931, by which it expressly sought modification of the decree to make Wyoming and Colorado share the burden of providing instream flows necessary to preserve critical wildlife habitat, and its 1991 motion, see 507 U. S. 1049 (1993), in which it sought an apportionment of nonirrigation-season flows. Wyoming also suggests that allegations of injury to wildlife are as yet purely speculative and would be best left to other forums.

Wyoming's arguments are not persuasive. To assign an affirmative obligation to protect wildlife is one thing; to consider all downstream effects of upstream development when assessing threats to equitable apportionment is quite another. As we have discussed above, *Nebraska II* makes it clear that modification of the decree (as by enjoining developments on tributaries) will follow only upon a "balancing of equities," 507 U. S., at 592, and that Nebraska will have to make a showing of "substantial injury" before we will grant it such relief, *id.*, at 593. There is no warrant for placing entire categories of evidence beyond Nebraska's reach when it attempts to satisfy this burden, which is far from insignificant.

Nor does our resistance to Nebraska's efforts to bring about broad new apportionments (as of nonirrigation-season flows) alter this conclusion. Here, Nebraska seeks only to have us enjoin discrete Wyoming developments. If Nebraska is to have a fair opportunity to present its case for our doing so, we do not understand how we can preclude it from setting forth that evidence of environmental injury, or consign it to producing that evidence in some other forum, since this is the only Court in which Nebraska can challenge the Wyoming projects. And as for Wyoming's argument that any proof of environmental injury that Nebraska will present will be highly speculative, the point is urged prematurely. Purely speculative harms will not, of course, carry Nebraska's burden of showing substantial injury, but at this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can.

C

Wyoming's third exception is to the Master's recommendation to allow Nebraska to proceed with its challenge to Wyoming's actions on Horse Creek, a tributary that flows into the North Platte below the Tri-State Dam. In Count I of its Amended Petition, Nebraska alleges that Wyoming is "presently violating and threatens to violate" Nebraska's equitable apportionment "by depleting the natural flows of the North Platte River by such projects as . . . reregulating reservoirs and canal linings in the . . . Horse Creek Conservancy District." App. to Third Interim Report D–5. Nebraska asks for an injunction against Wyoming's depletions of the creek.

Wyoming argues that the claim is simply not germane to this case, since Horse Creek feeds into the North Platte below the apportioned reach, the downstream boundary of which is the Tri-State Dam. It is clear, however, that the territorial scope of the case extends downstream of the pivotal reach. In the 1945 decision and decree, we held against apportioning that stretch of river between the Tri-State Dam and Bridgeport, Nebraska, not because it fell outside the geographic confines of the case, but because its needed water was "adequately supplied from return flows and other local sources." *Nebraska I*, 325 U. S., at 654–655. In so concluding, we had evidence that return flows from Horse Creek provided an average annual contribution of 21,900 acre-feet of water to the North Platte during the irrigation season. Third Interim Report 42.

Now Nebraska alleges that Wyoming's actions threaten serious depletion of these return flows, with consequent injury to its interests in the region below the Tri-State Dam. These allegations describe a change in conditions sufficient, if proven, to warrant the injunctive relief sought, and Nebraska is accordingly entitled to proceed with its claim. Wyoming's third exception is overruled.

D

In Counts I and III of its Amended Petition, Nebraska alleges that increased groundwater pumping within Wyoming threatens substantial depletion of the natural flow of the river. This allegation is obviously one of a change in conditions posing a threat of significant injury, and Wyoming concedes that "groundwater pumping in Wyoming can and does in fact deplete surface water flows in the North Platte River," Third Interim Report 38. In excepting nevertheless to the Master's recommendation that we allow the claim to go forward, Wyoming raises Nebraska's failure to regulate groundwater pumping within its own borders, which is said to preclude Nebraska as a matter of equity from seeking limitations on pumping within Wyoming.

We fail to see how the mere fact of unregulated pumping within Nebraska can serve to bar Nebraska's claim. Nebraska is the downstream State and claims that Wyoming's pumping hurts it; Wyoming is upstream and has yet to make a showing that Nebraska's pumping hurts it or anyone else. If Wyoming ultimately makes such a showing, it could well affect the relief to which Nebraska is entitled, but that is a question for trial, and does not stop Nebraska from amending its claims at this stage.

Wyoming's reliance on two of this Court's prior original cases is, at best, premature. Both cases were decided after trial, see *Kansas* v. *Colorado*, 206 U. S. 46, 49, 105 (1907); *Missouri* v. *Illinois*, 200 U. S. 496, 518 (1906), and while both recognize that relief on the merits may turn on the equities, 206 U. S., at 104–105, 113–114; 200 U. S., at 522, the application of that principle to Nebraska's claim is not, as we have just stated, obvious at this point. We accordingly accept the Master's recommendation, Third Interim Report 41, and overrule Wyoming's fourth exception.

IV

Wyoming's Fourth Amended Cross-Claim seeks declaratory and injunctive relief and is aimed against the United States alone, alleging that federal management of reservoirs has contravened state and federal law as well as contracts governing water supply to individual users. Wyoming claims that "the United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree . . . , (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U. S. C. §523, . . . and (e) exceeds the limitations in the contracts under the Warren Act." App. to Third Interim Report E–11 to E–12. Wyoming alleges that this mismanagement has made "water shortages . . . more frequen[t] and . . . more severe, thereby causing injury to Wyoming and its water users." *Id.*, at E–12.

The United States and Nebraska except to allowing Wyoming's cross-claim to proceed, for two reasons. They argue, first, that the decree expressly refrained from apportioning storage water, as distinct from natural flow, with the consequence that the violations alleged are not cognizable in an action brought under the decree. Second, they maintain that any claim turning on the United States's failure to comply with individual contracts for the release of storage water ought to be relegated to an action brought by individual contract holders in a federal district court and that, indeed, just such an action is currently pending in *Goshen Irrigation District* v. *United States*, No. C89–0161–J (D. Wyo., filed June 23, 1989).

The Master addressed both objections. As to the first, he said that "even though the decree did not apportion storage water, it was framed based in part on assumptions about storage water rights and deliveries," and that therefore "Wyoming should have the opportunity to go forward with her claims that the United States has violated the law and contracts rights and that such violations have the effect of undermining Wyoming's apportionment." Third Interim Report 70. The Master found the second point "unpersuasive" because "neither Wyoming nor Nebraska [is a party] to the *[Goshen]* case [brought by the individual contractors], and the federal district court, therefore, does not have jurisdiction to consider whether any violations that may be proven on the part of the United States will have the effect of undermining the 1945 apportionment decree." *Id.*, at 71. We agree with the Master on both counts.

The availability of storage water and its distribution under storage contracts was a predicate to the original apportionment decree. Our 1945 opinion expressly recognized the significance of storage water to the lands irrigated by the pivotal reach, noting that over the prior decade storage water was on average over half of the total supply and that over 90 percent of the irrigated lands had storage rights as well as rights to natural flow. *Nebraska I*, 325 U. S., at 605. We pointed out that Nebraska appropriators in the pivotal reach had "greater storage water rights" than Wyoming appropriators, *id.*, at 645, a fact that helped "tip the scales in favor of the flat percentage system," as against a scheme even more favorable to Nebraska, *ibid.*

In rejecting Wyoming's original proposal, which was to combine water from storage and natural flow and apportion both by volume among the different users, *id.*, at 621, we anticipated that the storage supply would "be left for distribution in accordance with the contracts which govern it," *id.*, at 631. In doing so, we were clearly aware of the beneficial use limitations that govern federal contracts for storage water. Contracts between the United States and individual water users on the North Platte, we pointed out, had been made and were maintained in compliance with § 8 of the Reclamation Act of 1902, 32 Stat. 388, 43 U. S. C. §§ 372, 383, which provided that " 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' " 325 U. S., at 613. In addition, contracts had been made under the Warren Act, 36 Stat. 925, 43 U. S. C. §§ 523–525, which granted the Secretary of the Interior the further power to contract for the storage and delivery of water available in excess of the requirements of any given project managed under the Reclamation Act. See *Nebraska I, supra*, at 631, 639–640.

Under this system, access to water from storage facilities was only possible by a contract for its use, *Nebraska I*, 325 U. S., at 640, and apportionment of storage water would have disrupted that system. "If storage water is not segregated, storage water contractors in times of shortage of the total supply will be deprived of the use of a part of the storage supply for which they pay . . . [and] those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply which, as we have seen, has been insufficient to go around." *Ibid.* Hence, we refrained from apportioning stored water and went no further than capping the total amount of storage in certain dams to protect senior, downstream rights to natural flow. *Id.*, at 630. But although our refusal in 1945 to apportion storage water was driven by a respect for the statutory and contractual regime in place at the time, we surely did not dismiss storage water as immaterial to the proper allocation of the natural flow in the pivotal reach. And while our decree expressly protected those with rights to storage water, it did so on the condition that storage water would continue to be distributed "in accordance with . . . lawful contracts . . . ." *Id.*, at 669. This is the very condition that Wyoming now seeks to vindicate.

Wyoming argues that the United States no longer abides by the governing law in administering the storage water contracts. First, it contends that the Government pays no heed to federal law's beneficial use limitations on the disposition of storage water but rather "releas[es] storage water on demand to the canals in the pivotal reach without regard to how the water is used." Brief for Wyoming in Response to Exceptions of Nebraska and United States to Third Interim Report 6 (emphasis deleted) (hereinafter Response Brief). This liberality allegedly harms Wyoming contractees whose storage supply is wasted, as well as junior Wyoming appropriators who are subject to the senior call of the United States to refill the reservoirs and are consequently deprived of the natural flow they would otherwise receive.

Second, Wyoming claims that federal policy in drought years encourages contract users to exploit this failure of the Government to police consumption. It points out that in years of insufficient supply, the United States has calculated each water district's average use of storage water in prior years, and then allocated to each district a certain percentage of that average, according to what the overall supply will bear. The United States has then further reduced the allotment of each individual canal within a district by the amount of natural flow delivered to the canal, with the result that in dry years water is distributed under "purely a mass [*i. e.*, fixed volume] allocation that sets a cap on the total diversion of each individual canal." *Id.*, at 8. Wyoming thus contends not only that under this system "in a dry year like 1989 the [United States's] allocation effectively replaces the Court decreed 75/25 apportionment," *id.*, at 9, but that the departure from the norm is needlessly great because the system "encourages individual canals to divert as much water as possible during 'non-allocation' years in order to maximize their average diversions which will be the measure of their entitlement in a subsequent dry year allocation," *id.*, at 8, n. 6.

If Wyoming were arguing merely that any administration of storage water that takes account of fluctuations in the natural flow received by a contractee violates the decree, we would reject its claim, for we recognized in 1945 that the outstanding Warren Act contracts contained "agree[ments] to deliver water which will, with all the water to which the land is entitled by appropriation or otherwise, aggregate a stated amount." 325 U. S., at 631. Indeed, we set forth an example of just such a contract in our opinion. *Id.*, at 631, n. 17. In asserting, however, that a predicate to the 1945 decree was that the United States adhered to beneficial use limitations in administering storage water contracts, that it no longer does so, and that this change has caused or permitted significant injury to Wyoming interests, Wyoming has said enough to state a serious claim that ought to be allowed to go forward.[2]

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[2] The dissent would disallow Wyoming's cross-claim on the grounds that Wyoming seeks neither to modify the decree (because it asks only for an injunction requiring the United States to adhere to its contracts and to the federal and state law governing storage water) nor to enforce it (since the decree presently contains no such mandate). This leaves Wyoming hanging. It cannot sue under the decree because a mandate of compliance

Although the claim may well require consideration of individual contracts and compliance with the Reclamation and Warren Acts, it does not follow (as Nebraska and the United States argue) that Wyoming is asserting the private contractors' rights proper, or (as the United States contends) that Wyoming brings suit "'in reality for the benefit of particular individuals,'" Brief for United States in Support of Exception 25, quoting *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 393–394 (1938). Wyoming argues only that the cumulative effect of the United States's failure to adhere to the law governing the contracts undermines the operation of the decree, see Response Brief 14–21, and thereby states a claim arising under the decree itself, one by which it seeks to vindicate its "'*quasi-sovereign*' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain,'" *Oklahoma ex rel. Johnson* v. *Cook*, *supra*, at 393, quoting *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907).

It is of no moment that some of the contracts could be made (or are) the subject of litigation between individual contract holders and the United States in federal district court. Wyoming is not a party to any such litigation and, as

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is not included in it, yet it cannot seek modification of the decree to include such a mandate, apparently because such relief is not sufficiently drastic. *Post*, at 24–26.

It seems very clear to us, however, that Wyoming is seeking a modification of the decree in order to enforce its predicate. As the dissent concedes, our 1945 decision could conceivably afford a "basis for ordering the United States to comply with applicable riparian law and with its storage contracts . . . ." *Post*, at 25–26. The dissent then rightly points out that such a position would be weak because the decree did not expressly mandate the compliance with lawful contracts and governing law that we anticipated in 1945. *Ibid.* Wyoming's Fourth Cross-Claim, however, now seeks just such a mandate by modifying the decree to require the United States to comply with its own contracts and with the federal and state law governing storage water.

counsel for the United States acknowledged at oral argument, it is uncertain whether the State would qualify for intervention in the ongoing *Goshen* litigation under Federal Rule of Civil Procedure 24. See Tr. of Oral Arg. 46. While the uncertainty of intervention is beside the point on the dissent's view, which "see[s] no reason . . . why Wyoming could not institute its own action against the United States in [district court]," *post,* at 27, the dissent nowhere explains how Wyoming would have standing to bring an action under storage water contracts to which it is not a party. As we have just said, Wyoming's claim derives not from rights under individual contracts but from the decree, and the decree can be modified only by this Court. Putting aside, then, whether another forum might offer relief that, as a practical matter, would mitigate the alleged ill effects of the National Government's contract administration, this is the proper forum for the State's claim, and it makes sense to entertain the claim in the course of adjudicating the broader controversy among Wyoming, Nebraska, and the United States. Cf. *United States* v. *Nevada,* 412 U. S. 534, 537 (1973) *(per curiam)* (denying motion for leave to file bill of complaint in part because "[t]here is now no controversy between the two States with respect to the . . . [r]iver [in question]").

Nor do we fear the specter, raised by the United States, of intervention by many individual storage contractors in this proceeding. Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U. S. 163, 173 (1930). A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U. S. 369, 373 (1953); cf. Fed. Rule Civ. Proc. 24(a)(2). We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States. *Nebraska I*, 325 U. S., at 627, citing *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 106–108 (1938); see also *Wyoming* v. *Colorado*, 286 U. S. 494, 508–509 (1932). As we view the litigation at the current time, it is unlikely to present occasion for individual storage contract holders to show that their proprietary interests are not adequately represented by their State.

Two caveats are nonetheless in order, despite our allowance of Wyoming's cross-claim. Nebraska argues that Wyoming is using its cross-claim as a back door to achieving the mass allocation of natural flows sought in its First Counterclaim and Cross-Claim. This argument will be difficult to assess without further development of the merits, and we can only emphasize at this point that in allowing Wyoming's Fourth Cross-Claim to go forward, we are not, of course, in any way sanctioning the very modification of the decree that we have just ruled out in this proceeding. Second, the parties should not take our allowance of the Fourth Cross-Claim as an opportunity to enquire into every detail of the United States's administration of storage water contracts. The United States's contractual compliance is not, of itself, an appropriate subject of the Special Master's attention, which is properly confined to the effects of contract administration on the operation of the decree. Contractual compliance, as such, is the subject of the *Goshen* litigation, which we presume will move forward independently of this original action.

V

For these reasons, the exceptions to the Special Master's Third Interim Report are overruled.

It is so ordered.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with the decision of the Court to overrule all of Wyoming's exceptions to the Third Interim Report on Motions to Amend Pleading (Report). Accordingly, I join Parts I, II, and III of the Court's opinion. I do not agree, however, that we should overrule the exceptions of the United States and Nebraska to the Master's recommendation that Wyoming be allowed to proceed with its proposed Fourth Cross-Claim against the United States. I would sustain those exceptions and require Wyoming to pursue that claim in another forum.

Wyoming's Fourth Cross-Claim begins with the following allegation:

> "The equitable apportionment which the Decree was intended to carry into effect was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs." App. to Report E–11.

Wyoming then alleges generally that "[t]he United States has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs." *Ibid.* According to Wyoming, these failures have "caused water shortages to occur more frequently and to be more severe, thereby causing injury to Wyoming and its water users." *Id.*, at E–12. In short, Wyoming alleges that "a predicate to the 1945 decree was that the United States adhered to [riparian law's] beneficial use limitations in administering storage water contracts, that it no longer does so, and that this change has caused or permitted significant injury to Wyoming interests." *Ante*, at 19.

In the abstract, these allegations are sufficient to state a claim for modification of the decree based on changed circumstances. Such relief is authorized by the decree's Paragraph XIII, which invited the parties to "apply at the foot of this decree for its amendment or for further relief." *Nebraska* v. *Wyoming,* 325 U. S. 589, 671 (1945) *(Nebraska I).* In particular, subdivision (f) of Paragraph XIII anticipates that we might modify the decree in light of "[a]ny change in conditions making modifications of the decree or the granting of further relief necessary or appropriate." *Id.,* at 672. Thus, in light of the Federal Government's failure to satisfy our expectation that it would comply with applicable riparian law and with its contracts, we might engage in "a reweighing of equities" and accordingly "reope[n]" the 1945 apportionment of the North Platte and modify the decree in Wyoming's favor. *Nebraska* v. *Wyoming,* 507 U. S. 584, 593 (1993) *(Nebraska II).*

If Wyoming's Fourth Cross-Claim against the United States had actually sought such relief, I might agree with the Court's decision to allow the claim to proceed. But the cross-claim's prayer for relief seeks neither a reapportionment of the North Platte nor any other modification of the decree. Instead, it asks the Court "to enjoin the United States' continuing violations of federal and state law and . . . to direct the United States to comply with the terms of its contracts." App. to Report E–12. This prayer makes perfect sense: Why seek to modify the decree based on a "change in conditions" if such change could be reversed or annulled by means of injunctive relief grounded in existing law? Indeed, were existing law sufficient to prevent the injuries alleged by Wyoming, the State could hardly point to the "considerable justification" necessary for "reopening an apportionment of interstate water rights." *Nebraska II, supra,* at 593.[1]

Yet precisely because the injunctive relief requested by Wyoming arises out of and depends on a body of law that exists independently of the decree, the Court errs in asserting that Wyoming "states a claim arising under the decree itself." *Ante,* at 20. This is so for two reasons. First, a claim that the United States must comply with applicable law and with contracts governed by such law—here, § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U. S. C. §§ 372, 383, the Warren Act, ch. 141, 36 Stat. 925, 43 U. S. C. §§ 523–525, and other federal and state riparian law, see *ante,* at 17—necessarily "arises under" that body of law. See, *e. g., Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.,* 463 U. S. 1, 8–9 (1983) (approving, as a principle of inclusion, "Justice Holmes' statement, 'A suit arises under the law that creates the cause of action'" (quoting *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916))).

Second, although a decree entered by this Court could conceivably afford an additional and separate basis for ordering the United States to comply with applicable riparian law and with its storage contracts, our 1945 decree in fact does not. That is, we "*anticipated* that the storage [water] supply would 'be left for distribution in accordance with the contracts which govern it,'" *ante*, at 17 (emphasis added) (quoting *Nebraska I*, 325 U. S., at 631), but we did not *mandate* that result. To the contrary, Paragraph VI of the decree states expressly that "[s]torage water shall not be affected by this decree" and that storage water shall be distributed "without interference because of this decree." *Id.*, at 669. Accord, Brief for Wyoming in Response to Exceptions of Nebraska and the United States 19 ("No one asserted [in 1945] a need for the Court affirmatively to require the [Federal Government's] compliance with federal law; such compliance was assumed").

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[1] To the Court, "[i]t seems very clear . . . that Wyoming is seeking a modification of the decree in order to enforce its predicate." *Ante,* at 20, n. 2. I would expect such clarity to show in the language of the Fourth Cross-Claim itself, but the prayer for relief notably fails to include the word "modify" or its synonyms. In this regard, the Fourth Cross-Claim stands in marked contrast to Wyoming's other cross-claims and its counterclaims against Nebraska. Compare App. to Report E–12 (Fourth Cross-Claim's prayer for relief) with *id.,* at E–6, E–7, E–8, E–10, E–11, E–12 (other prayers). Wyoming is not left "hanging" by its failure to seek a modification of the decree as to the United States' compliance with applicable riparian law and with its contracts. *Ante,* at 19–20, n. 2. As I explain *infra,* at 27–28, the State may seek its requested relief in another forum.

Because Wyoming's Fourth Cross-Claim against the United States therefore involves neither "an application for *enforcement* of rights already recognized in the decree" nor a request for "a *modification* of the decree," *Nebraska II*, *supra*, at 590, I do not understand why the Court chooses to entertain that claim as part of the present proceeding. It is well established that "[w]e seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States* v. *Nevada*, 412 U. S. 534, 538 (1973) *(per curiam)*. This particular reluctance applies squarely to "controversies between the United States and a State," of which we have "original *but not exclusive* jurisdiction." 28 U. S. C. § 1251(b)(2) (emphasis added). Thus, in *United States* v. *Nevada*, we declined to exercise jurisdiction over a dispute between those parties about intrastate water rights, noting that such dispute was "within the jurisdiction of the District Court" in Nevada. 412 U. S., at 538. Accord, *id.*, at 539–540 ("Any possible dispute with California with respect to United States water uses in that State can be settled in the lower federal courts in California . . .").[2]

These principles should be applied here. Although I agree with the Court that the mere existence of pending litigation brought by individual storage contract holders against the United States in the Federal District Court in Wyoming is not dispositive, see *ante*, at 20–21, I see no reason (and the parties offer none) why Wyoming could not institute its own action against the United States in that forum.[3] Moreover,

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[2] Our decision in *California* v. *Nevada*, 447 U. S. 125 (1980), is also on point. There, as here, we exercised our exclusive original jurisdiction over a dispute between two States, but we declined to expand the reference to the Special Master to include borderland ownership and title disputes that "typically will involve only one or the other State and the United States, or perhaps various citizens of those States." *Id.*, at 133. Instead, we explained, "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain." *Ibid.*

Subsequent to our decision in *United States* v. *Nevada* in 1973, we have, in the majority of actions by States against the United States or its officers, summarily denied the motion for leave to file a bill of complaint. See *Georgia* v. *Nixon, President of the United States*, 414 U. S. 810 (1973); *Idaho* v. *Vance, Secretary of State*, 434 U. S. 1031 (1978); *Indiana* v. *United States*, 471 U. S. 1123 (1985); *Michigan* v. *Meese, Attorney General of the United States*, 479 U. S. 1078 (1987); *Mississippi* v. *United States*, 499 U. S. 916 (1991). Accord, *United States* v. *Florida*, 430 U. S. 140 (1977) *(per curiam)* (denying motion by Florida for leave to file counterclaim).

[3] The reason cannot be, as the Court seems to think, that "Wyoming's claim derives not from rights under individual contracts but from the decree, and the decree can be modified only by this Court." *Ante*, at 21. As I have explained, the first of these propositions is not correct. The second is correct, of course, but also irrelevant: Wyoming seeks not a modification of the decree but an injunction directing the United States to comply with applicable riparian law and with its contracts, thereby *obviating* the need for this Court to modify the decree. Thus, by "[p]utting aside . . . whether another forum might offer relief that, as a practical matter, would mitigate the alleged ill effects of the National Government's contract administration," *ibid.*, the Court actually puts aside the only relief sought by the claim the Court allows to proceed.

As for standing, see *ante*, at 21, I simply repeat the Court's own discussion of this subject. In brief, Wyoming's standing is predicated given the number and variety of the other new or amended claims we have approved today, see *ante,* at 11–15—not to mention the issues left unresolved by our 1993 opinion, see *Nebraska II,* 507 U. S., at 596–603—the significant statutory and contractual issues raised by Wyoming's cross-claim against the United States would most likely be resolved in the District Court with far greater dispatch. Indeed, the present round of litigation has dragged on for almost *nine years,* but we are not even beyond the stage of considering amendments to the pleadings.

Finally, although I share the Court's distaste at the prospect of intervention by individual storage contract holders in this original action, see *ante,* at 21–22, I find it just as distasteful unnecessarily to deny private parties the opportunity to participate in a case the disposition of which may impair their interests. By remitting Wyoming's claim to the District Court, we would allow the storage contract holders to participate voluntarily by joinder or intervention, see Fed. Rules Civ. Proc. 20(a) and 24, or to be joined involuntarily in the interest of just adjudication, see Rule 19.

* * *

The Court's decision to entertain Wyoming's Fourth Cross-Claim against the United States departs from our established principles for exercising our original jurisdiction, ignores the relief requested by Wyoming, and needlessly opens the possibility to a reapportionment of the North Platte. In short, it constitutes "a misguided exercise of [our] discretion." *Wyoming* v. *Oklahoma,* 502 U. S. 437, 475 (1992) (THOMAS, J., dissenting). Accordingly, I respectfully dissent from the Court's decision in this regard.

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upon its allegation that the United States has failed to "adher[e] to beneficial use limitations in administering storage water contracts . . . and that this [failure] has caused or permitted significant injury to Wyoming interests." *Ante,* at 19.

NORTH STAR STEEL CO. *v.* THOMAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94–834. Argued April 25, 1995—Decided May 30, 1995*

Respondents filed separate claims under the federal Worker Adjustment and Retraining Notification Act (WARN), which authorizes a civil enforcement action by aggrieved employees or their union against a covered employer who fails to give 60 days notice of a plant closing or mass layoff, but provides no limitations period for such an action. In rejecting petitioner employer's contention that the statute of limitations had run, the District Court in *Crown Cork* held that the source of the limitations period for WARN suits is state law and that respondent union's suit was timely under any of the arguably applicable Pennsylvania statutes. In *North Star,* however, another District Court granted summary judgment for petitioner employer, holding respondent employees' suit barred under a limitations period borrowed from the National Labor Relations Act, which the court believed was "more analogous" to WARN than any state law. The Third Circuit consolidated the cases and held that a WARN limitations period should be borrowed from state, not federal, law, reversing in *North Star* and affirming in *Crown Cork.*

Held: State law is the proper source of the limitations period for civil actions brought to enforce WARN. Pp. 33–37.

(a) Where a federal statute fails to provide any limitations period for a new cause of action, this Court's longstanding and settled practice has been to borrow the limitations period from the most closely analogous state statute. A closely circumscribed and narrow exception to this general rule allows borrowing from elsewhere in federal law when the arguably relevant state limitations periods would frustrate or interfere with the implementation of national policies or be at odds with the purpose or operation of federal substantive law. See, *e. g., DelCostello* v. *Teamsters,* 462 U. S. 151, 161, 172. Pp. 33–35.

(b) These cases fall squarely inside the general rule, not the exception. The presumption that state law will be the source of a missing

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*Together with No. 94–835, *Crown Cork & Seal Co., Inc.* v. *United Steelworkers of America, AFL–CIO–CLC,* also on certiorari to the same court.

federal limitations period was already longstanding when WARN was passed in 1988, justifying the assumption that Congress intended by its silence that courts borrow state law. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 147. Accordingly, since the complaints in both of these cases were timely even under the shortest of the potentially-applicable Pennsylvania statutes of limitations, there is no need to go beyond the Court of Appeals's decision to choose the best of the four, and it is enough to say here that none of these statutes would be at odds with WARN's purpose or operation, or frustrate or interfere with the intent behind it. *DelCostello, supra*, at 166, distinguished. Although petitioners are right that the adoption of state limitations periods can result in variations from State to State and encourage forum shopping, these are just the costs of the general rule itself, and nothing about WARN makes them exorbitant. *Agency Holding Corp., supra*, at 149, 153–154, distinguished. Because a state counterpart provides a limitations period without frustrating consequences here, it is simply beside the point that a perfectly good federal analogue exists. Pp. 35–37.

32 F. 3d 53, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 37.

Steven B. Feirson argued the cause for petitioners in both cases. On the briefs in No. 94–834 were *Vincent Candiello, Wayne D. Rutman*, and *Peter Buscemi.* With Mr. Feirson on the briefs in No. 94–835 was *Jerome A. Hoffman.*

Laurence Gold argued the cause for respondents in both cases. On the briefs in No. 94–834 were *Paul Alan Levy* and *Alan B. Morrison.* With Mr. Gold on the briefs in No. 94–835 were *Robert M. Weinberg, Jeremiah A. Collins, Carl B. Frankel, David I. Goldman*, and *David M. Silberman.*

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Deputy Solicitor*

General Kneedler, Allen H. Feldman, Steven J. Mandel, and *Judith D. Heimlich.*†

JUSTICE SOUTER delivered the opinion of the Court.

The Worker Adjustment and Retraining Notification Act (WARN or Act), 102 Stat. 890, 29 U. S. C. § 2101 *et seq.*, obliges covered employers to give employees or their union 60 days notice of a plant closing or mass layoff. These consolidated cases raise the issue of the proper source of the limitations period for civil actions brought to enforce the Act. For actions brought in Pennsylvania, and generally, we hold it to be state law.

I

With some exceptions and conditions, WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U. S. C. § 2102(a). The employer is supposed to notify, among others, "each affected employee" or "each representative of the affected employees." 29 U. S. C. § 2102(a)(1). An employer who violates the notice provisions is liable for penalties by way of a civil action that may be brought "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." § 2104(a)(5). The class of plaintiffs includes aggrieved employees (or their unions, as representatives), *ibid.*, who may collect "back pay for each day of violation," § 2104(a)(1)(A), "up to a maximum of 60 days," § 2104(a)(1). While the terms of the statute are specific on other matters, WARN does not provide a limitations period for the civil actions authorized by § 2104.

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†*Stephen A. Bokat, Mona C. Zeiberg, Jan Amundson,* and *Quentin Riegel* filed a brief for the Chamber of Commerce of the United States of America et al. as *amici curiae* urging reversal.

Kary L. Moss and *Mark Granzotto* filed a brief for California Rural Legal Assistance, Inc., et al. as *amici curiae* urging affirmance.

In *Crown Cork,* respondent United Steelworkers of America brought a WARN claim in Federal District Court in Pennsylvania, charging Crown Cork & Seal Co., Inc., with laying off 85 employees at its Perry, Georgia, plant in September 1991, without giving the required 60-day notice. Crown Cork moved for summary judgment, claiming that the statute of limitations had run. The District Court denied the motion, holding the source of the limitations period for WARN suits to be Pennsylvania state law and the union's suit timely under any of the arguably applicable state statutes. 833 F. Supp. 467 (ED Pa. 1993). The District Court nevertheless certified the question of the limitations period for immediate interlocutory appeal under 28 U. S. C. § 1292.

The *North Star* respondents are former, nonunion employees of petitioner North Star Steel Company who filed a WARN claim against the company (also in a Federal District Court in Pennsylvania) alleging that the company laid off 270 workers at a Pennsylvania plant without giving the 60-day advance notice. Like Crown Cork, and for like reasons, North Star also moved for summary judgment. But North Star was successful, the District Court holding the suit barred under the 6-month limitations period for unfair labor practice claims borrowed from the National Labor Relations Act (NLRA), 49 Stat. 449, 29 U. S. C. § 160(b), a statute believed by the court to be "more analogous" to WARN than anything in state law. 838 F. Supp. 970, 974 (MD Pa. 1993).

The United States Court of Appeals for the Third Circuit consolidated the cases and held that a period of limitations for WARN should be borrowed from state, not federal, law, reversing in *North Star* and affirming in *Crown Cork.* 32 F. 3d 53 (1994). Like the District Court in *Crown Cork,* the Court of Appeals did not pick from among the several Pennsylvania statutes of limitations that might apply to

WARN, since none of them would have barred either of the actions before it.

The Third Circuit's decision deepened a split among the Courts of Appeals on the issue of WARN's limitations period. See *United Paperworkers Int'l Union* v. *Specialty Paperboard, Inc.*, 999 F. 2d 51 (CA2 1993) (applying state-law limitations period); *Halkias* v. *General Dynamics Corp.*, 31 F. 3d 224 (CA5) (applying NLRA limitations period), rehearing en banc granted, 9 IER Cases 1754 (CA5 1994); *United Mine Workers of America* v. *Peabody Coal Co.*, 38 F. 3d 850 (CA6 1994) (same). We granted certiorari to resolve it, 513 U. S. 1072 (1995), and now affirm.

II

A

A look at this Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims. See, *e. g.*, *Reed* v. *Transportation Union*, 488 U. S. 319 (1989) (claims under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U. S. C. § 411(a)(2), governed by state personal injury statutes); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143 (1987) (civil actions under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964, governed by 4-year statute of limitations of the Clayton Act, 69 Stat. 283, as amended, 15 U. S. C. § 15b); *Wilson* v. *Garcia*, 471 U. S. 261 (1985) (civil rights claims under 42 U. S. C. § 1983 governed by state statutes of limitations for personal injury actions); *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983) (hybrid suit by employee against employer for breach of a collective-bargaining agreement and against union for breach of a duty of fair representation governed by NLRA limitations period). Although these examples show borrowing from federal law as well as state, our practice has left no doubt about the lender of first resort. Since 1830, "state statutes have repeatedly supplied the periods of limitations for federal causes of action" when the federal legislation made no provision, *Automobile Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 703–704 (1966), and in seeking the right state rule to apply, courts look to the state statute "'most closely analogous'" to the federal Act in need, *Reed, supra,* at 323, quoting *DelCostello, supra,* at 158. Because this penchant to borrow from analogous state law is not only "longstanding," *Agency Holding Corp., supra,* at 147, but "settled," *Wilson, supra,* at 266, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them," *Cannon* v. *University of Chicago,* 441 U. S. 677, 699 (1979). See *Agency Holding Corp., supra,* at 147.*

There is, of course, a secondary lender, for we have recognized "a closely circumscribed . . . [and] narrow exception to the general rule," *Reed, supra,* at 324, based on the common sense that Congress would not wish courts to apply a limitations period that would only stymie the policies underlying the federal cause of action. So, when the state limitations periods with any claim of relevance would "'frustrate or interfere with the implementation of national policies,'" *DelCostello, supra,* at 161, quoting *Occidental Life Ins. Co. of Cal.* v. *EEOC,* 432 U. S. 355, 367 (1977), or be "at odds with the purpose or operation of federal substantive law," *DelCostello, supra,* at 161, we have looked for a period that might be provided by analogous federal law, more in harmony with the objectives of the immediate cause of action. See, *e. g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U. S. 350, 362 (1991); *Agency Holding Corp., supra,* at

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*The expectation is reversed for statutes passed after December 1, 1990, the effective date of 28 U. S. C. § 1658 (1988 ed., Supp. V), which supplies a general, 4-year limitations period for any federal statute subsequently enacted without one of its own.

153, 156; *DelCostello, supra,* at 171–172. But the reference to federal law is the exception, and we decline to follow a state limitations period "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" *Reed, supra,* at 324, quoting *DelCostello, supra,* at 172.

B

These cases fall squarely inside the rule, not the exception. The presumption that state law will be the source of a missing federal limitations period was already "longstanding," *Agency Holding Corp.,* 483 U. S., at 147, when WARN was passed in 1988, justifying the assumption that Congress "intend[ed] by its silence that we borrow state law," *ibid.* Accordingly, the Court of Appeals identified four Pennsylvania statutes of limitations that might apply to WARN claims: the 2-year period for enforcing civil penalties generally, Pa. Stat. Ann., Tit. 42, § 5524(5) (Purdon 1981 and 1994 Supp.); the 3-year period for claims under the Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann., Tit. 43, § 260.9a(g) (Purdon 1992); the 4-year period for breach of an implied contract, Pa. Stat. Ann., Tit. 42, § 5525(4) (Purdon 1981); and the six years under the residual statute of limitations, Pa. Stat. Ann., Tit. 42, § 5527 (Purdon 1981 and 1994 Supp.). See 32 F. 3d, at 61. Since the complaints in both *Crown Cork* and *North Star* were timely even under the shortest of these, there is no need to go beyond the decision of the Court of Appeals to choose the best of four, and it is enough to say here that none of these potentially applicable statutes would be "at odds" with WARN's "purpose or operation," or "'frustrate or interfere with'" the intent behind it. *DelCostello,* 462 U. S., at 161.

The contrast with *DelCostello* is clear. There the Court declined to borrow state limitations periods for so-called "hybrid" claims brought by an employee against both his employer and his union, for the reason that the state-law candidates "typically provide[d] very short times" for suit (generally 90 days) and thus "fail[ed] to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." *Id.*, at 166, and n. 15. Here, the shortest of the arguably usable state periods, however, is two years, which is not short enough to frustrate an employee seeking relief under WARN. At the other end, even the longest of the periods, six years, is not long enough to frustrate the interest in "a relatively rapid disposition of labor disputes." See *Automobile Workers, supra,* at 707 (borrowing a 6-year state limitations period for claims brought under § 301 of the Labor-Management Relations Act).

We do not take petitioners to disagree seriously, for the heart of their argument is not that the state periods are too long or too short. They submit instead that, if we look to state law, WARN litigation presents undue risks of forum shopping, such that we ought to pick a uniform federal rule for all claims (with the NLRA, and its 6-month limitations period for unfair labor practices claims, 29 U. S. C. § 160(b), being the federal Act most analogous to WARN). But even taking petitioners on their own terms, they make no case for choosing the exception over the rule. They are right, of course, that the practice of adopting state statutes of limitations for federal causes of action can result in different limitations periods in different States for the same federal action, and correct that some plaintiffs will canvass the variations and shop around for a forum. But these are just the costs of the rule itself, and nothing about WARN makes them exorbitant.

It is, indeed, true that "practicalities of litigation" influenced our rationale for adopting a uniform federal rule for civil actions under RICO. *Agency Holding Corp., supra,* at 153. But WARN's obligations are triggered by a "plant closing" or a "mass layoff" at a "single site of employment," 29 U. S. C. §§2101(a)(2)–(3), and so, unlike RICO violations, do not "commonly involve interstate transactions." *Agency Holding Corp.*, 483 U. S., at 153. WARN thus fails to share the "multistate nature" of RICO, *id.*, at 154, and is so relatively simple and narrow in its scope, see *id.*, at 149 (listing the many categories of crimes that can be predicate acts for a RICO violation), that "no [comparable] practicalities of litigation compel us to search beyond state law for a more analogous statute of limitations," *Reed*, 488 U. S., at 327. Since, then, a state counterpart provides a limitations period without frustrating consequences, it is simply beside the point that even a perfectly good federal analogue exists.

The judgment of the Court of Appeals is

Affirmed.

Justice Scalia, concurring in the judgment.

I remain of the view that when Congress has not prescribed a limitations period to govern a cause of action that it has created, the Court should apply the appropriate state statute of limitations, or, if doing so would frustrate the purposes of the federal enactment, no limitations period at all. See *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 157–170 (1987) (Scalia, J., concurring in judgment); see also *Reed* v. *Transportation Union*, 488 U. S. 319, 334 (1989) (Scalia, J., concurring in judgment). The rule first announced in *DelCostello* v. *Teamsters*, 462 U. S. 151, 172 (1983), that a federal limitations period should be selected when it presents a "closer analogy" to the federal cause of action and is "significantly more appropriate," I find to be not only erroneous but unworkable. If the "closer analogy" part of this is to be taken seriously, the federal statute would end up applying in some States but not in others; and the "significantly more appropriate" part is meaningless, since in all honesty a uniform nationwide limitations period for a federal cause of action is *always* significantly more appropriate.

I have joined in applying to a so-called "implied" cause of action the limitations period contained in the federal statute out of which the cause of action had been judicially created. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 364–366 (1991) (SCALIA, J., concurring in part and concurring in judgment). But the cause of action at issue here was created not by us, but by Congress. Accordingly, in my view, the appropriate state statute of limitations governs.

Because none of the state statutes arguably applicable here would frustrate the purposes of the Worker Adjustment and Retraining Notification Act (WARN), 29 U. S. C. § 2101 *et seq.*, and because the WARN actions before us are timely under even the shortest of those statutes, I concur in the Court's judgment.

GARLOTTE *v.* FORDICE, GOVERNOR OF MISSISSIPPI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94–6790. Argued April 24, 1995—Decided May 30, 1995

A Mississippi trial court ordered that petitioner Garlotte serve, consecutively, a 3-year prison sentence on a marijuana conviction, followed by concurrent life sentences on two murder convictions. State law required Garlotte to serve at least 10 months on the first sentence and 10 years on the concurrent sentences. Garlotte unsuccessfully sought state postconviction collateral relief on the marijuana conviction. By the time those proceedings ended, he had completed the period of incarceration set for the marijuana offense, and had commenced serving the life sentences. The Federal District Court denied his subsequent federal habeas petition on the merits, but the Court of Appeals dismissed the petition for want of jurisdiction. The Court of Appeals adopted the State's position that Garlotte had already served out the prison time imposed for the marijuana conviction and, therefore, was no longer "in custody" under the conviction within the meaning of the federal habeas statute, 28 U. S. C. §2254(a). The court rejected Garlotte's argument that he remained "in custody" because the marijuana conviction continued to postpone the date on which he would be eligible for parole.

Held: Garlotte was "in custody" under his marijuana conviction when he filed his federal habeas petition. Pp. 43–47.

(a) In *Peyton* v. *Rowe*, 391 U. S. 54, this Court allowed two prisoners incarcerated under consecutive sentences to apply for federal habeas relief from sentences they had not yet begun to serve. Viewing consecutive sentences in the aggregate, the Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of the habeas statute. A different construction of the statutory term "in custody" will not be adopted here simply because the sentence imposed under the challenged conviction lies in the past rather than in the future. *Maleng* v. *Cook*, 490 U. S. 488—in which the Court held that a habeas petitioner could not challenge a conviction after the sentence imposed for it had fully expired—does not control this case, for the habeas petitioner in *Maleng*, unlike Garlotte, was not serving consecutive sentences. Pp. 43–46.

(b) Allowing a habeas attack on a sentence nominally completed is unlikely to encourage delay in the assertion of habeas challenges. A prisoner naturally prefers release sooner to release later, and delay is apt to disadvantage a petitioner—who has the burden of proof—more than the State. Moreover, under Habeas Corpus Rule 9(a), a district court may dismiss a habeas petition if the State has been prejudiced in its ability to respond because of inexcusable delay in the petition's filing. Pp. 46–47.

29 F. 3d 216, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 47.

Brian D. Boyle, by appointment of the Court, 513 U. S. 1125, argued the cause for petitioner. With him on the briefs were *James R. Asperger* and *Matthew B. Pachman.*

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief were *Mike Moore*, Attorney General, and *Jo Anne M. McLeod* and *John L. Gadow*, Special Assistant Attorneys General.*

JUSTICE GINSBURG delivered the opinion of the Court.

To petition a federal court for habeas corpus relief from a state-court conviction, the applicant must be "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a); see also 28 U. S. C. § 2241(c)(3). In *Peyton* v. *Rowe*, 391 U. S. 54 (1968), we held that the governing federal prescription permits prisoners incarcerated under consecutive state-court sentences to apply for federal habeas relief from sentences they had not yet begun to serve. We said in *Peyton* that, for purposes of habeas relief, consecutive sentences should be treated as a continuous series; a prisoner is "in custody in violation of the

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**Harold J. Krent* filed a brief for the Post-Conviction Assistance Project of the University of Virginia et al. as *amici curiae* urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Constitution," we explained, "if any consecutive sentence [the prisoner is] scheduled to serve was imposed as the result of a deprivation of constitutional rights." *Id.*, at 64–65.

The case before us is appropriately described as *Peyton*'s complement, or *Peyton* in reverse. Like the habeas petitioners in *Peyton*, petitioner Harvey Garlotte is incarcerated under consecutive sentences. Unlike the *Peyton* petitioners, however, Garlotte does not challenge a conviction underlying a sentence yet to be served. Instead, Garlotte seeks to attack a conviction underlying the sentence that ran first in a consecutive series, a sentence already served, but one that nonetheless persists to postpone Garlotte's eligibility for parole. Following *Peyton*, we do not disaggregate Garlotte's sentences, but comprehend them as composing a continuous stream. We therefore hold that Garlotte remains "in custody" under all of his sentences until all are served, and now may attack the conviction underlying the sentence scheduled to run first in the series.

I

On September 16, 1985, at a plea hearing held in a Mississippi trial court, Harvey Garlotte entered simultaneous guilty pleas to one count of possession with intent to distribute marijuana and two counts of murder. Pursuant to a plea agreement, the State recommended that Garlotte be sentenced to a prison term of three years on the marijuana count, to run consecutively with two concurrent life sentences on the murder counts. App. 43. State law required Garlotte to serve at least ten months on the marijuana count, Miss. Code Ann. § 47–7–3(1)(c)(ii) (Supp. 1994), and at least ten years on the concurrent life sentences. § 47–7–3(1).

At the plea hearing, the trial judge inquired whether the State wanted Garlotte to serve the life sentences before the three-year sentence: "[A] three year sentence [on the marijuana possession count] to run consecutive to th[e] two life sentences?" the judge asked. The prosecutor expressed indifference about the order in which the sentences would run: "Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years." App. 43. The judge next asked Garlotte's counsel about his understanding of the State's recommendation. Defense counsel replied, without elaboration: "[I]t's my understanding that the possession case is to run first and then the two life sentences." *Id.*, at 44. The court saw "no reason not to go along with the recommendation of the State." *Id.*, at 50. Without further explanation, the court imposed the sentences in this order: the three-year sentence first, then, consecutively, the concurrent life sentences. *Ibid.*

Garlotte wrote to the trial court seven months after the September 16, 1985 hearing, asking for permission to withdraw his guilty plea on the marijuana count. The court's reply notified Garlotte of the Mississippi statute under which he could pursue postconviction collateral relief. *Id.*, at 51. Garlotte unsuccessfully moved for such relief. Nearly two years after the denial of Garlotte's motion, the Mississippi Supreme Court rejected his appeal. *Garlotte* v. *State*, 530 So. 2d 693 (1988). On January 18, 1989, the Mississippi Supreme Court denied further postconviction motions filed by Garlotte. By this time, Garlotte had completed the period of incarceration set for the marijuana offense, and had commenced serving the life sentences.

On October 6, 1989, Garlotte filed a habeas corpus petition in the United States District Court for the Southern District of Mississippi, naming as respondent Kirk Fordice, the Governor of Mississippi.[1] Adopting the recommendation of a

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[1] Garlotte asserted that he was entitled to relief because his guilty plea was not knowing, intelligent, and voluntary, he did not receive effective assistance of trial counsel, he was subjected to double jeopardy, and his sentence was unusual and disproportionate. App. 6.

Federal Magistrate Judge, the District Court denied Garlotte's petition on the merits. App. 18.

Before the United States Court of Appeals for the Fifth Circuit, the State argued for the first time that the District Court lacked jurisdiction over Garlotte's petition. 29 F. 3d 216, 217 (1994). The State asserted that Garlotte, prior to the District Court filing, had already served out the prison time imposed for the marijuana conviction; therefore, the State maintained, Garlotte was no longer "in custody" under that conviction within the meaning of the federal habeas statute. *Ibid.* Garlotte countered that he remained "in custody" until all sentences were served, emphasizing that the marijuana conviction continued to postpone the date on which he would be eligible for parole. *Id.*, at 218.

Adopting the State's position, the Fifth Circuit dismissed Garlotte's habeas petition for want of jurisdiction. *Ibid.* The Courts of Appeals have divided over the question whether a person incarcerated under consecutive sentences remains "in custody" under a sentence that (1) has been completed in terms of prison time served, but (2) continues to postpone the prisoner's date of potential release.[2] We granted certiorari to resolve this conflict, 513 U. S. 1123 (1995), and now reverse.[3]

II

The federal habeas statute authorizes United States district courts to entertain petitions for habeas relief from state-court judgments only when the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a); see also 28 U. S. C. § 2241(c)(3). In *Peyton* v. *Rowe,* 391 U. S. 54 (1968), we held that the statute authorized the exercise of habeas jurisdiction over the petitions of two State of Virginia prisoners, Robert Rowe and Clyde Thacker. Rowe and Thacker were incarcerated under consecutive sentences; both sought to challenge sentences slated to run in the future. Virginia, relying on *McNally* v. *Hill,* 293 U. S. 131 (1934), argued that the habeas petitions were premature. Overruling *McNally,* we explained:

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[2] Compare *Fawcett* v. *Bablitch*, 962 F. 2d 617, 618 (CA7 1992) ("in custody"); *Bernard* v. *Garraghty*, 934 F. 2d 52, 55 (CA4 1991) (same); and *Fox* v. *Kelso*, 911 F. 2d 563, 568 (CA11 1990) (same), with *Allen* v. *Dowd*, 964 F. 2d 745, 746 (CA8) (not "in custody"), cert. denied, 506 U. S. 920 (1992).

[3] Garlotte, who proceeded *pro se* in the courts below, filed along with his petition for certiorari a motion for appointment of counsel. After we granted certiorari, we appointed Brian D. Boyle, of Washington, D. C., to represent Garlotte. 513 U. S. 1125 (1995).

> "[I]n common understanding 'custody' comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them. Under that interpretation, they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights." 391 U. S., at 64–65 (citations omitted).

The habeas petitioners in *Peyton* sought to present challenges that, if successful, would advance their release dates. That was enough, we concluded, to permit them to invoke the Great Writ. *Id.,* at 66–67.

Had the Mississippi trial court ordered that Garlotte's life sentences run before his marijuana sentence—an option about which the prosecutor expressed indifference—*Peyton* unquestionably would have instructed the District Court to entertain Garlotte's present habeas petition. Because the marijuana term came first, and Garlotte filed his habeas petition (following state-court proceedings) after prison time had run on the marijuana sentence, Mississippi urges that *Maleng* v. *Cook*, 490 U. S. 488 (1989) *(per curiam)*, rather than *Peyton*, controls.

The question presented in *Maleng* was "whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." 490 U. S., at 492. We held that the potential use of a conviction to enhance a sentence for subsequent offenses did not suffice to render a person "in custody" within the meaning of the habeas statute. *Ibid.*

Maleng recognized that we had "very liberally construed the 'in custody' requirement for purposes of federal habeas," but stressed that the Court had "never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction." *Ibid.* "[A]lmost all States have habitual offender statutes, and many States provide . . . for specific enhancement of subsequent sentences on the basis of prior convictions," *ibid.;* hence, the construction of "in custody" urged by the habeas petitioner in *Maleng* would have left nearly all convictions perpetually open to collateral attack. The *Maleng* petitioner's interpretation, we therefore commented, "would read the 'in custody' requirement out of the statute." *Ibid.*[4]

Unlike the habeas petitioner in *Maleng*, Garlotte is serving consecutive sentences. In *Peyton*, we held that "a prisoner serving consecutive sentences is 'in custody' under any one of them" for purposes of the habeas statute. 391 U. S., at 67. Having construed the statutory term "in custody" to require that consecutive sentences be viewed in the aggregate, we will not now adopt a different construction simply because the sentence imposed under the challenged conviction lies in the past rather than in the future.[5]

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[4] We left open the possibility, however, that the conviction underlying the expired sentence might be subject to challenge in a collateral attack upon the subsequent sentence that the expired sentence was used to enhance. *Maleng*, 490 U. S., at 494.

Mississippi urges, as a prime reason for its construction of the "in custody" requirement, that allowing a habeas attack on a sentence nominally completed would "encourage and reward delay in the assertion of habeas challenges." Brief for Respondent 28. As Mississippi observes, in *Peyton* we rejected the prematurity rule of *McNally* in part because of "the harshness of a rule which may delay determination of federal claims for decades." *Peyton,* 391 U. S., at 61. Mississippi argues that Garlotte's reading of the words "in custody" would undermine the expeditious adjudication rationale of *Peyton.* Brief for Respondent 6–7, 27–28.

Our holding today, however, is unlikely to encourage delay. A prisoner naturally prefers release sooner to release later. Further, because the habeas petitioner generally bears the burden of proof, delay is apt to disadvantage the petitioner more than the State. Nothing in this record, we note, suggests that Garlotte has been dilatory in challenging his marijuana conviction. Finally, under Habeas Corpus Rule 9(a), a district court may dismiss a habeas petition if the State

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[5] That Mississippi itself views consecutive sentences in the aggregate for various penological purposes reveals the difficulties courts and prisoners would face trying to determine when one sentence ends and a consecutive sentence begins. For example, Mississippi aggregates consecutive sentences for the purpose of determining parole eligibility, see Miss. Code Ann. § 47–7–3(1) (Supp. 1994) ("Every prisoner . . . who has served not less than one-fourth (1/4) of *the total of such term or terms* for which such prisoner was sentenced . . . may be released on parole as hereinafter provided . . . .") (emphasis added), and for the purpose of determining commutation of sentences for meritorious earned-time credit. See Miss. Code Ann. § 47–5–139(3) (1981) ("An offender under two (2) or more consecutive sentences shall be allowed commutation based upon *the total term* of the sentences.") (emphasis added).

"has been prejudiced in its ability to respond to the petition by [inexcusable] delay in its filing."

* * *

Under *Peyton*, we view consecutive sentences in the aggregate, not as discrete segments. Invalidation of Garlotte's marijuana conviction would advance the date of his eligibility for release from present incarceration. Garlotte's challenge, which will shorten his term of incarceration if he proves unconstitutionality, implicates the core purpose of habeas review. We therefore hold that Garlotte was "in custody" under his marijuana conviction when he filed his federal habeas petition. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

The Court concludes that a habeas petitioner may assert that he "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U. S. C. § 2254(a), even when the petitioner admits that the conviction he wishes to challenge has expired. Because this construction of the habeas statute is neither required by our case law nor, more importantly, by the statute, I dissent.

In holding that Garlotte was in custody for his expired marijuana conviction, the Court relies heavily on *Peyton* v. *Rowe*, 391 U. S. 54 (1968). There, petitioners wished to challenge sentences that they had not yet begun to serve, claiming that they were nevertheless "in custody" under these sentences. Overruling *McNally* v. *Hill*, 293 U. S. 131 (1934), we held that such challenges could proceed. Practical considerations drove us to adopt a rule permitting early challenges to convictions. Allowing challenges to sentences that had yet to commence might prevent stale claims from being brought years after the crime and trial. *Peyton, supra,* at 62–63. Recognizing that the first reason for finding the petitioners in *Peyton* "in custody" is not present here (and indeed may cut against the majority's conclusion), the Court relies on the second ground, namely, that a prisoner serving time under consecutive sentences "is 'in custody' under any one of them" for purposes of § 2241(c)(3). *Ante,* at 45 (some internal quotation marks omitted) (quoting 391 U. S., at 67).[1]

In my view, *Peyton* ought to be construed as limited to situations in which a habeas petitioner challenges a yet unexpired sentence. This would satisfy *Peyton*'s policy concerns by permitting challenges to unserved sentences at an earlier time. More importantly, this interpretation would also make sense of the Court's proper insistence in *Maleng* v. *Cook,* 490 U. S. 488 (1989), that the habeas statute does not permit prisoners to challenge expired convictions. See *id.,* at 490–491 ("We have interpreted the statutory language as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed"). The majority, however, relies upon broad language in one opinion to ignore language in another.[2] Given the statute's text and the oddity of asserting that Garlotte is still serving time under the expired marijuana conviction, I would read *Peyton* narrowly. Accordingly, I dissent.

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[1] The Court argues that because Mississippi "views consecutive sentences in the aggregate for various penological purposes," that fact somehow "reveals the difficulties courts and prisoners would face trying to determine when one sentence ends and a consecutive sentence begins." *Ante,* at 46, n. 5. We face many difficulties in interpreting statutes. Those difficulties should not lead us to conclude that petitioner was "in custody" any more than they should lead us to decide that he was not "in custody."

[2] I recognize that *Peyton*'s concluding paragraph enunciated a broad "hold[ing]." 391 U. S., at 67. Other language in the opinion suggests a narrower holding, however. See *id.,* at 64–65 (prisoners are in custody "if any consecutive sentence they *are scheduled to serve* was imposed as the result of a deprivation of constitutional rights") (emphasis added). *Maleng,* itself, described *Peyton*'s holding as permitting a prisoner "who was serving two consecutive sentences imposed . . . [to] challenge the second sentence *which he had not yet begun to serve.*" 490 U. S., at 493 (emphasis added).

RENO, ATTORNEY GENERAL, ET AL. *v.* KORAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94–790. Argued April 24, 1995—Decided June 5, 1995

Under 18 U. S. C. § 3585(b), a defendant generally must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." Before respondent's federal sentence commenced, he was "released" on bail pursuant to the Bail Reform Act of 1984 and ordered confined to a community treatment center. After his prison sentence began, the Bureau of Prisons (BOP) relied on its established policy in refusing to credit toward his sentence the time he had spent at the treatment center. He exhausted his administrative remedies and then filed a federal habeas corpus petition. A District Court denied his petition on the ground that his stay at the center was not "official detention" under § 3585(b). In reversing, the Court of Appeals declined to defer to BOP's view that time spent under highly restrictive conditions while "released" on bail is not "official detention" because a "released" defendant is not subject to BOP's control. It reasoned instead that "official detention" includes time spent under conditions of "jail-type confinement."

Held: The time respondent spent at the treatment center while "released" on bail was not "official detention" within the meaning of § 3585(b). Pp. 55–65.

(a) Viewed in isolation, the phrase "official detention" could either refer, as the Government contends, to a court order detaining a defendant and committing him to the custody of the Attorney General for confinement, or, as respondent argues, to the restrictive conditions of his release on bail under an "official" order that significantly curtailed his liberty. Examination of the phrase in light of the context in which it is used, however, reveals that the Government's interpretation is correct. P. 56.

(b) The "official detention" language must be construed in conjunction with the Bail Reform Act of 1984, since § 3585(b) provides credit only for *presentence* restraints on liberty and since it is the Bail Reform Act that authorizes federal courts to place such restraints on a defendant's liberty. That Act provides a court with only two choices: It may either "release" a defendant on bail, 18 U. S. C. § 3142(c), or order him "detained" without bail, § 3142(e). A defendant suffers "detention" only when committed to the Attorney General's custody, § 3142(i)(2); a defendant admitted to bail, even on restrictive conditions, as respondent was, see § 3142(c), is "released." Pp. 56–58.

(c) Section 3585(a) and related sentencing provisions confirm the view that § 3585(b) is available only to those defendants who were detained in a penal or correctional facility and subject to BOP's control. The context and history of § 3585(b) also support this reading. The provision reduces a defendant's "imprisonment" by the amount of time spent in "official detention" before his sentence, strongly suggesting that the presentence "detention" period must be equivalent to the "imprisonment" itself. And nothing suggests that when Congress replaced § 3568 with § 3585(b), it substituted the phrase "official detention" for "in custody" because it disagreed with the Courts of Appeals' uniform rule that § 3568 denied credit to defendants released on bail. To the contrary, Congress presumably made the change to conform the credit statute to the nomenclature used in related sentencing provisions and in the Bail Reform Act of 1984. Pp. 58–60.

(d) In an internal guideline, BOP likewise has interpreted the phrase "official detention" to require credit only for a defendant's time spent under a § 3142 "detention order." This is the most natural reading of the phrase, and the internal guideline of the agency charged with administering the credit statute is entitled to some deference where it is a permissible construction of the statute. Pp. 60–61.

(e) In contrast, respondent's reading of "official detention" is plausible only if the phrase is read in isolation. But even then, it is not the only plausible interpretation. Respondent correctly notes that a defendant "released" to a treatment center could be subject to restraints that do not materially differ from those imposed on a "detained" defendant who is assigned to a treatment center as part of his sentence. However, that fact does not undercut the important distinction between *all* defendants "detained" and *all* defendants "released" on bail: The former always remain completely subject to BOP's control. The Court of Appeals' alternative construction would require a fact-intensive inquiry into the circumstances of confinement in each case to determine whether a defendant "released" on bail was subjected to "jail-type confinement." On the other hand, the Government's construction provides both it and a defendant with clear notice of the consequences of a "release" or "detention" order. Finally, the rule of lenity does not apply here. A statute is not "ambiguous" for purposes of the rule merely because there is a division of judicial authority over its proper construction. Rather, the rule applies only if, after seizing everything from which aid can be derived, this Court can make no more than a guess as to what Congress intended. That is not this case. Pp. 61–65.

21 F. 3d 558, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post,* p. 65. STEVENS, J., filed a dissenting opinion, *post,* p. 66.

Miguel A. Estrada argued the cause for petitioners. With him on the briefs were *Solicitor General Days, Assistant Attorney General Harris, Deputy Solicitor General Dreeben,* and *Joseph Douglas Wilson.*

Irwin Rochman argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Title 18 U. S. C. § 3585(b) provides that a defendant generally must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." Before the commencement of respondent's federal sentence, a Federal Magistrate Judge "released" him on bail pursuant to the Bail Reform Act of 1984 and ordered him confined to a community treatment center. The question presented is whether respondent was in "official detention," and thus entitled to a sentence credit under § 3585(b), during the time he spent at the treatment center. We hold that he was not.

On April 23, 1991, respondent Ziya Koray was arrested for laundering monetary instruments in violation of 18 U. S. C. § 1956(a)(1). On June 18, 1991, he pleaded guilty to that charge in the United States District Court for the District of Maryland. One week later, on June 25, 1991, a Federal Magistrate Judge entered a "release order" pursuant to 18 U. S. C. § 3142(c), ordering respondent released on bail, pending sentencing, into the custody of the Pretrial Services

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**Charles D. Weisselberg, Michael J. Brennan,* and *Dennis E. Curtis* filed a brief for the University of Southern California Law Center's Post-Conviction Justice Project as *amicus curiae.*

Agency. The order required that he be "confined to [the] premises" of a Volunteers of America community treatment center without "authoriz[ation] to leave for any reason unless accompanied" by a Government special agent. On October 22, 1991, the District Court sentenced respondent to 41 months' imprisonment. Respondent remained at the Volunteers of America facility until November 25, 1991, the day he reported to the Allenwood Federal Prison Camp to serve his sentence.

Respondent requested the Bureau of Prisons (BOP or Bureau) to credit toward his sentence of imprisonment the approximately 150 days he spent at the Volunteers of America community treatment center between June 25 and November 25, 1991. Relying on its established policy, BOP refused to grant the requested credit. After exhausting his administrative remedies, respondent filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking credit under 18 U. S. C. § 3585 for the time he spent at the community treatment center. The District Court denied the petition, finding that respondent's stay at the center did not constitute "official detention" within the meaning of 18 U. S. C. § 3585(b).

The Court of Appeals for the Third Circuit reversed. 21 F. 3d 558 (1994). It acknowledged that the overwhelming majority of the Courts of Appeals "have concluded that section 3585 . . . does not require the Bureau to credit presentenced defendants whose bail conditions allowed them to be confined outside of Bureau of Prison[s] facilities." *Id.*, at 561. The court declined, however, to defer to the Bureau's view—that time spent under highly restrictive conditions while "released" on bail is not "'official detention'" under § 3585(b) because a "'released'" defendant is not subject to the Bureau's control. *Id.*, at 562–565. Instead, the court reasoned that § 3585(b)'s "'official detention'" language need not be read "as if it provided 'official detention *by the Attorney General or the Bureau of Prisons*,'" since "there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau," and since "[a] court may 'detain' a person as 'official[ly]' as the Attorney General." *Id.*, at 563–564. Concluding that "'official detention' for purposes of credit under 18 U. S. C. § 3585 includes time spent under conditions of jail-type confinement," *id.*, at 567, the Court of Appeals remanded the case for a determination whether respondent was in "jail-type confinement" during his stay at the Volunteers of America community treatment center.

We granted the Government's petition for certiorari to resolve a conflict among the Courts of Appeals on the question whether a federal prisoner is entitled to credit against his sentence under § 3585(b) for time when he was "released" on bail pursuant to the Bail Reform Act of 1984.[1] 513 U. S. 1106 (1995). We now reverse.

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[1] Compare *Dawson* v. *Scott*, 50 F. 3d 884, 887–888 (CA11 1995) (time spent in halfway house and safe house while released on bond not creditable toward sentence); *Moreland* v. *United States*, 968 F. 2d 655, 657–660 (CA8) (en banc) (time spent in halfway house while released on bond not creditable toward sentence), cert. denied, 506 U. S. 1028 (1992); *United States* v. *Edwards*, 960 F. 2d 278, 282–283 (CA2 1992) (time spent in home confinement under electronic monitoring while released on bond not creditable toward sentence); *Pinedo* v. *United States*, 955 F. 2d 12, 14 (CA5 1992) *(per curiam)* (time spent on bail prior to trial not creditable toward sentence); *United States* v. *Becak*, 954 F. 2d 386, 387–388 (CA6) (time spent at mother's house under conditions of release while released on bond not creditable toward sentence), cert. denied, 504 U. S. 945 (1992); *United States* v. *Zackular*, 945 F. 2d 423, 425 (CA1 1991) (time spent in home confinement prior to sentencing not creditable toward sentence); *United States* v. *Insley*, 927 F. 2d 185, 186 (CA4 1991) (time spent in home confinement while released on appeal bond not creditable toward sentence); *United States* v. *Woods*, 888 F. 2d 653, 655–656 (CA10 1989) (time spent at halfway house while released on bond not creditable toward sentence), cert. denied, 494 U. S. 1006 (1990), with *Mills* v. *Taylor*, 967 F. 2d 1397, 1400 (CA9 1992) (time spent in community treatment center while released on bail creditable toward sentence where "conditions of release approach[ed] those of incarceration").

Title 18 U. S. C. § 3585 determines when a federal sentence of imprisonment commences and whether credit against that sentence must be granted for time spent in "official detention" before the sentence began. It states:

> "Calculation of a term of imprisonment
>
> "(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> "(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in *official detention* prior to the date the sentence commences—
>
> "(1) as a result of the offense for which the sentence was imposed; or
>
> "(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> "that has not been credited against another sentence." 18 U. S. C. § 3585 (emphasis added).

In *United States* v. *Wilson*, 503 U. S. 329, 337 (1992), we specifically noted Congress' use of the term "'official detention'" in § 3585(b), but we had no occasion to rule on the meaning of that term. We must do so today.[2]

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[2] Our task is strictly one of statutory interpretation. Respondent argued in the District Court that § 3585 violated equal protection principles by treating pretrial defendants differently than postsentenced defendants. App. 23. The District Court rejected this argument. App. to Pet. for Cert. A–28. Respondent waived his equal protection argument in the Third Circuit, see 21 F. 3d 558, 559, n. 1 (1994), and he has not renewed it here. In an *amicus curiae* brief filed with this Court, University of Southern California Law Center's Post-Conviction Justice Project raises a similar equal protection argument, see Brief for USC Law Center's Post-Conviction Justice Project as *Amicus Curiae* 20–23, but that argu-

The Government contends that the phrase "official detention" in § 3585(b) refers to a court order detaining a defendant and committing him to the custody of the Attorney General for confinement. Respondent, on the other hand, argues that the phrase "official detention" includes the restrictive conditions of his release on bail because the Federal Magistrate's bail order was "official" and significantly curtailed his liberty. Viewing the phrase in isolation, it may be said that either reading is plausible. But it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U. S. 129, 132 (1993). After examining the phrase "official detention" in this light, we believe the Government's interpretation is the correct one.

Section 3585(b) provides credit for time "spent in official detention *prior to the date the sentence commences*," 18 U. S. C. § 3585(b) (emphasis added), thus making clear that credit is awarded only for *presentence* restraints on liberty. Because the Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.*, is the body of law that authorizes federal courts to place presentence restraints on a defendant's liberty, see § 3142(a) (authorizing courts to impose restraints on the defendant "pending trial"); § 3143(a) (authorizing courts to impose restraints while the defendant "is waiting imposition or execution of sentence"), the "official detention" language of § 3585(b) must be construed in conjunction with that Act. This is especially so because the Bail Reform Act of 1984 was enacted in the same statute as the Sentencing Reform Act of

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ment is not properly before the Court. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981) (noting that this Court does not decide issues raised by *amici* that were not decided by the court of appeals or argued by the interested party); *Bell* v. *Wolfish*, 441 U. S. 520, 531, n. 13 (1979) (same).

1984, of which § 3585 is a part.[3] See *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407–408 (1991) ("It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms," since Congress is presumed to have "legislated with reference to" those terms).

The Bail Reform Act of 1984 provides a federal court with two choices when dealing with a criminal defendant who has been "charged with an offense" and is awaiting trial, 18 U. S. C. § 3142(a), or who "has been found guilty of an offense and . . . is awaiting imposition or execution of sentence," 18 U. S. C. § 3143(a)(1) (1988 ed., Supp. V). The court may either (1) "release" the defendant on bail or (2) order him "detained" without bail. A court may "release" a defendant subject to a variety of restrictive conditions, including residence in a community treatment center. See §§ 3142(c)(1)(B)(i), (x), and (xiv). If, however, the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," § 3142(e), the court "shall order the detention of the person," *ibid.*, by issuing a "detention order" "direct[ing] that the person be committed to the custody of the Attorney General for confinement in a corrections facility," § 3142(i)(2). Thus, under the language of the Bail Reform Act of 1984, a defendant suffers "detention" only when committed to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions, as respondent was, is "released." See *Dawson* v. *Scott*, 50 F. 3d 884, 889–890, and nn. 11–12 (CA11 1995); *Moreland* v. *United States*, 968 F. 2d 655, 659–660 (CA8), cert. denied, 506 U. S. 1028 (1992); 968 F. 2d, at 661–663

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[3] See Comprehensive Crime Control Act of 1984, Pub. L. 98–473, Tit. II, 98 Stat. 1976. The provisions of the Comprehensive Crime Control Act of 1984 relating to bail are known as the Bail Reform Act of 1984. Pub. L. 98–473, Tit. II, ch. I, 98 Stat. 1976. The provisions relating to sentencing, including the credit provision of § 3585(b), are known as the Sentencing Reform Act of 1984. Pub. L. 98–473, Tit. II, ch. II, 98 Stat. 1987.

(Loken, J., concurring); *United States* v. *Becak*, 954 F. 2d 386, 388 (CA6), cert. denied, 504 U. S. 945 (1992).

Section 3585(a) and related sentencing provisions confirm this interpretation. Section 3585(a) provides that a federal sentence "commences" when the defendant is received for transportation to or arrives at "the official detention facility at which the sentence is to be served." Title 18 U. S. C. § 3621, in turn, provides that the sentenced defendant "shall be committed to the custody of the Bureau of Prisons," § 3621(a), which "*may designate any available penal or correctional facility* . . . , whether maintained by the Federal Government or otherwise . . . , that the Bureau determines to be appropriate and suitable," § 3621(b) (emphasis added). The phrase "official detention facility" in § 3585(a) therefore must refer to a correctional facility designated by the Bureau for the service of federal sentences, where the Bureau retains the discretion to "direct the transfer of a prisoner from one penal or correctional facility to another." § 3621(b).

This reading of § 3585(a) is reinforced by other provisions governing the administration of federal sentences. For example, § 3622 gives the Bureau authority to release a prisoner from the place of his imprisonment for a limited period to "participate in a training or educational program in the community while continuing in official detention at the prison facility," § 3622(b), or to "work at paid employment in the community while continuing in official detention at the penal or correctional facility," § 3622(c). Because the words "official detention" should bear the same meaning in subsections (a) and (b) of § 3585 as they do in the above related sentencing statutes, see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 479 (1992) ("[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning"), credit for time spent in "official detention" under § 3585(b) is available only to those defendants who were detained in a "penal or correctional facility," § 3621(b), and who were subject to BOP's control.

The context and history of § 3585(b) also support this view. As for context, § 3585(b) reduces a defendant's "imprisonment" by the amount of time spent in "official detention" before his sentence, strongly suggesting that the period of presentence "detention" must be equivalent to the "imprisonment" itself. It would be anomalous to interpret § 3585(b) to require sentence credit for time spent confined in a community treatment center where the defendant is not subject to BOP's control, since Congress generally views such a restriction on liberty as part of a sentence of "probation," see 18 U. S. C. §§ 3563(b)(10), (12), and (14), or "supervised release," see § 3583(d), rather than part of a sentence of "imprisonment." See *United States* v. *Zackular,* 945 F. 2d 423, 425 (CA1 1991).

With respect to history, § 3585(b)'s predecessor, 18 U. S. C. § 3568 (1982 ed.) (repealed), required the Attorney General to award sentence credit for "any days spent *in custody* in connection with the offense or acts for which sentence was imposed." (Emphasis added.) The Courts of Appeals uniformly held that the phrase "in custody" did not allow sentence credit because of restrictions placed on a defendant's liberty as a condition of release on bail. See *Polakoff* v. *United States,* 489 F. 2d 727, 730 (CA5 1974) (time spent on "highly restricted bond" not creditable as " 'custody' "); *United States* v. *Robles,* 563 F. 2d 1308, 1309 (CA9 1977) ("[T]ime spent on bail or on bond pending appeal is not time served 'in custody' "), cert. denied, 435 U. S. 925 (1978); *Ortega* v. *United States,* 510 F. 2d 412, 413 (CA10 1975) (" 'custody' " refers to "actual custodial incarceration," not "the time a criminal defendant is free on bond"); *United States* v. *Peterson,* 507 F. 2d 1191, 1192 (CADC 1974) (" 'in custody' " does "not refer to the stipulations imposed when a defendant is at large on conditional release"). In 1984, Congress enacted § 3585(b) and altered § 3568 by, *inter alia,* "replac[ing] the term 'custody' with the term 'official detention.' " *Wilson,* 503 U. S., at 337; see also

18 U. S. C. § 3585(b). In thus rewording the credit statute, however, nothing suggests that Congress disagreed with the Courts of Appeals' rule denying credit to defendants who had been released on bail. To the contrary, Congress presumably made the change to conform the credit statute to the nomenclature used in related sentencing provisions, see 18 U. S. C. §§ 3585(a) and 3622, and in the Bail Reform Act of 1984. See *Moreland*, 968 F. 2d, at 662, and n. 5 (Loken, J., concurring).

The Bureau, as the agency charged with administering the credit statute, see *Wilson, supra,* at 334–335, likewise has interpreted § 3585(b)'s "official detention" language to require credit for time spent by a defendant under a § 3142(e) "detention order," but not for time spent under a § 3142(c) "release order," no matter how restrictive the conditions.[4] As we have explained, see *supra*, at 56–60, the

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[4] The Bureau's view of § 3585(b) is explained in U. S. Dept. of Justice, Bureau of Prisons Program Statement No. 5880.28(c) (July 29, 1994), which reads as follows:

"Prior Custody Time Credit. The [Sentencing Reform Act] includes a new statutory provision, 18 U. S. C. § 3585(b), that pertains to 'credit for prior custody' *and is controlling for making time credit determinations for sentences imposed under the SRA*. . . .

. . . . .

"*Definitions:*

. . . . .

"Official detention. 'Official detention' is defined, for purposes of this policy, as time spent under a federal detention order. This also includes time spent under a *detention* order when the court has *recommended* placement in a less secure environment or in a community based program as a condition of presentence detention. A person under these circumstances remains in 'official detention,' subject to the discretion of the Attorney General and the U. S. Marshals Service with respect to the place of detention. Those defendants placed in a program and/or residence as a condition of detention are subject to removal and return to a more secure environment at the discretion of the Attorney General and the U. S. Marshals Service, and further, remain subject to prosecution for escape from detention for any unauthorized absence from the program/residence. Such a person is not similarly situated with persons conditionally *released*

Bureau's interpretation is the most natural and reasonable reading of § 3585(b)'s "official detention" language. It is true that the Bureau's interpretation appears only in a "Program Statemen[t]"—an internal agency guideline—rather than in "published regulations subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment." 21 F. 3d, at 562. But BOP's internal agency guideline, which is akin to an "interpretive rule" that "do[es] not require notice and comment," *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995), is still entitled to some deference, cf. *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 157 (1991), since it is a "permissible construction of the statute," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

Respondent, as we have indicated, disagrees with the above interpretation of § 3585(b). He contends that the "plain meaning" of the phrase "official detention" includes the restrictive conditions of his confinement, even though he

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from detention with a requirement of program participation and/or residence.

"A defendant is not eligible for any credits while *released* from detention. Time spent in residence in a community corrections center as a result of the *Pretrial Services Act of 1982* (18 U. S. C. § 3152–3154), or as a result of a condition of bail or bond (18 U. S. C. § 3141–3143), is not creditable as presentence time. A condition of bail or bond which is 'highly restrictive,' and that includes 'house arrest', 'electronic monitoring' or 'home confinement'; or such as requiring the defendant to report daily to the U. S. Marshal, U. S. Probation Service, or other person; is not considered as time in official detention. Such a defendant is not subject to the discretion of the U. S. Attorney General, the Bureau of Prisons, or the U. S. Marshals Service, regarding participation, placement, or subsequent return to a more secure environment, and therefore is not in a status which would indicate an award of credit is appropriate (see *Randall* v. *Whelan*, 938 F. 2d 522 (4th Cir. 1991) and *U. S.* v. *Insley*, 927 F. 2d 185 (4th Cir. 1991). Further, the government may not prosecute for escape in the case of an unauthorized absence in such cases, as the person has been lawfully *released* from 'official detention.'" (Emphasis in original.)

was released on bail. This contention is a plausible one if the phrase is read in isolation: respondent was subjected to restrictive conditions when released on bail, these conditions were imposed by a court order, and his sojourn in the community treatment center therefore amounted to "official detention." But even without reference to the context of the language and the history of the statute, respondent's is not the only plausible interpretation of the language; it would be too much to say that the statute "cannot bear the interpretation adopted by" the Bureau. *Sullivan* v. *Everhart,* 494 U. S. 83, 91–92 (1990). And in light of the foregoing textual and historical analysis, the initial plausibility of respondent's reading simply does not carry the day.

Respondent also argues it is improper to focus on the release/detention dichotomy of the Bail Reform Act of 1984 to construe § 3585(b)'s "official detention" language because a defendant "released" on bail may be subjected to conditions (under 18 U. S. C. § 3142(c)(1)(B)(xiv)) that are just as onerous as those faced by "detained" defendants. In addition, he asserts that his confinement as a "released" defendant in the Volunteers of America community treatment center constituted "official detention" because "sentenced" prisoners are deemed to be in "official detention" when BOP authorizes them to serve the last part of their sentences in a community treatment center, see U. S. Dept. of Justice, Bureau of Prisons Program Statement No. 7310.02 (Oct. 19, 1993) (interpreting 18 U. S. C. § 3624(c) to allow BOP to place sentenced prisoners in community corrections centers, since such centers meet 18 U. S. C. § 3621(b)'s definition of a "penal or correctional facility"), or to serve their sentences on educational or work release, see 18 U. S. C. §§ 3622(b) and (c).

It is quite true that under the Government's theory a defendant "released" to a community treatment center could be subject to restraints which do not materially differ from those imposed on a "detained" defendant committed to the custody of the Attorney General, and thence assigned to a treatment center. But this fact does not undercut the remaining distinction that exists between *all* defendants committed to the custody of the Attorney General on the one hand, and *all* defendants released on bail on the other. Unlike defendants "released" on bail, defendants who are "detained" or "sentenced" *always remain subject to the control of the Bureau.* See *Randall* v. *Whelan,* 938 F. 2d 522, 525 (CA4 1991). This is an important distinction, as the identity of the custodian has both legal and practical significance. A defendant who is "released" is not in BOP's custody, and he cannot be summarily reassigned to a different place of confinement unless a judicial officer revokes his release, see 18 U. S. C. § 3148(b), or modifies the conditions of his release, see § 3142(c)(3). A defendant who is "detained," however, is completely subject to BOP's control. And "[t]hat single factor encompasses a wide variety of restrictions." *Randall, supra,* at 525. "Detained" defendants are subject to BOP's disciplinary procedures; they are subject to summary reassignment to any other penal or correctional facility within the system, cf. *Meachum* v. *Fano,* 427 U. S. 215, 224–229 (1976); and, being in the legal custody of BOP, the Bureau has full discretion to control many conditions of their confinement. See *Moody* v. *Daggett,* 429 U. S. 78, 88, n. 9 (1976); *Bell* v. *Wolfish,* 441 U. S. 520, 544–548 (1979).[5]

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[5] In some cases, a defendant will be arrested, denied bail, and held in custody pursuant to state law, being turned over later to the Federal Government for prosecution. In these situations, BOP often grants credit under § 3585(b) for time spent in *state* custody, see, *e. g.,* U. S. Dept. of Justice, Federal Bureau of Prisons, Operations Memorandum (Oct. 23, 1989); U. S. Dept. of Justice, Federal Bureau of Prisons, Sentence Computation Manual CCCA (1992 and Supp. 1994), even though the defendant was *not* subject to the control of BOP. These situations obviously are not governed by reference to a § 3142 "release" or "detention" order. But because the only question before us is whether a defendant is in "official detention" under § 3585(b) during the time he is "released" on bail *pursu-*

It may seem unwise policy to treat defendants differently for purposes of sentence credit under § 3585(b) when they are similarly situated in fact—the one is confined to a community treatment center after having been "detained" and committed to the Bureau's custody, while the other is "released" to such a center on bail. But the alternative construction adopted by the Court of Appeals in this case has its own grave difficulties. To determine in each case whether a defendant "released" on bail was subjected to "jail-type confinement" would require a fact-intensive inquiry into the circumstances of confinement, an inquiry based on information in the hands of private entities not available to the Bureau as a matter of right. Even were such information more readily available, it seems certain that the phrase "jail-type confinement" would remain sufficiently vague and amorphous so that much the same kind of disparity in treatment for similarly situated defendants would arise. The Government's construction of § 3585(b), on the other hand, provides both it and the defendant with clear notice of the consequences of a § 3142 "release" or "detention" order.

Respondent finally suggests that the rule of lenity requires adoption of the "jail-type confinement" test for purposes of calculating credit under § 3585(b) because "there is a split of authority in the Circuits concerning the reach of 'official detention,'" Brief for Respondent 34, n. 13, and because there is ambiguity as to which forms of custody fall within the meaning of "'official detention.'" See *id.*, at 34. Respondent misconstrues the doctrine. A statute is not "'am-

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ant to the Bail Reform Act of 1984, we need not and do not rule here on the propriety of BOP's decision to grant credit under § 3585(b) to a defendant who is denied bail *pursuant to state law* and held in the custody of state authorities. Thus, the dissent is simply wrong when it states that we have "adopt[ed] an interpretation that the Bureau of Prisons itself has rejected" by not allowing any "'credit for time spent in state custody.'" *Post*, at 67, 68.

biguous' for purposes of lenity merely because" there is "a division of judicial authority" over its proper construction. *Moskal* v. *United States*, 498 U. S. 103, 108 (1990). The rule of lenity applies only if, "after seizing everything from which aid can be derived," *Smith* v. *United States*, 508 U. S. 223, 239 (1993) (internal quotation marks and brackets omitted), we can make "no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U. S. 169, 178 (1958). That is not this case.

We hold that the time respondent spent at the Volunteers of America community treatment center while "released" on bail pursuant to the Bail Reform Act of 1984 was not "official detention" within the meaning of 18 U. S. C. § 3585(b). Respondent therefore was not entitled to a credit against his sentence of imprisonment. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

As the Government reads 18 U. S. C. § 3585(b), Koray gains credit against his sentence for the two months he spent in jail, but not for the five months' close confinement he encountered at the halfway house. The Court cogently explains why it adopts the Government's interpretation. I write separately to point out that Koray has not argued before us that he did not elect bail intelligently, *i. e.*, with comprehension that time in the halfway house, unlike time in jail, would yield no credit against his eventual sentence. The Court thus does not foreclose the possibility that the fundamental fairness we describe as "due process" calls for notice and a comprehension check. Cf. Fed. Rule Crim. Proc. 11 (setting out information a court is to convey to assure that a defendant who pleads guilty understands the consequences of the plea).

JUSTICE STEVENS, dissenting.

Pursuant to an order entered by a federal judicial officer, respondent was "confined to premises of [Volunteers of America (VOA)]," a private halfway house. The order of confinement—euphemistically styled a "release" order—provided that respondent "shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." Brief for Respondent 3. While at VOA, respondent "had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility." *Koray* v. *Sizer*, 21 F. 3d 558, 566 (CA3 1994). Except for one off-site medical exam, respondent remained at VOA 24 hours a day for 150 days. In my opinion, respondent's confinement was unquestionably both "official" and "detention" within the meaning of 18 U. S. C. § 3585(b).

Both the text and the purpose of § 3585(b) clearly contemplate that a person who is locked up for 24 hours a day, seven days a week, pursuant to a court order, is in "official detention." Such a person is surely in custody, and that custody is no less "official" for being ordered by a court rather than the Attorney General. Indeed, even the majority acknowledges the force of this plain meaning argument. *Ante*, at 61–62.* Moreover, the manifest purpose of § 3585(b) is to give a convicted person credit for all time spent in official

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*See also *Koray* v. *Sizer*, 21 F. 3d 558, 565 (CA3 1994) ("'To a normal English speaker, even to a legal English speaker, being forced to live in a halfway house is to be held "in custody"'"); *Mills* v. *Taylor*, 967 F. 2d 1397, 1401 (CA9 1992) ("[C]onfinement to a treatment center 'falls convincingly within both the plain meaning and the obvious intent' of 'official detention'"); *Moreland* v. *United States*, 968 F. 2d 655, 664 (CA8 1992) (Heaney, J., joined by Lay, C. J., and McMillian, R. Arnold, and Gibson, JJ., dissenting) ("ordinary definition of detention is a 'period of temporary custody prior to disposition by a court'").

custody as a result of the offense that gave rise to his conviction. When that confinement is in a facility that has all the restraints of a typical prison, it should not matter whether that facility is operated by a State, a county, or a private custodian pursuant to a contract with the Government.

Purporting to establish the contrary conclusion, the Court labors to prove the rather obvious proposition that all persons in the custody of the Attorney General pursuant to a detention order issued under 18 U. S. C. § 3142 (1988 ed. and Supp. V), as well as all persons confined in an "official detention facility" under § 3585(a), are also in "official detention" within the meaning of § 3585(b). However, proof that confinement under § 3142 or § 3585(a) constitutes official detention certainly is not proof that no other form of confinement can constitute official detention. The majority thus fails to demonstrate that respondent should not receive sentencing credit for his court-ordered full-time confinement in a jail-type facility.

Moreover, the Court's restrictive interpretation creates an anomalous result. Under the Court's view that only a person "committed to the custody of the Attorney General" can be in "official detention," § 3585(b) does not authorize any credit for time spent in state custody, "no matter how restrictive the conditions." *Ante*, at 60, 63–64, n. 5. This conclusion is so plainly at war with common sense that even the Attorney General rejects it. See Brief for Petitioners 11 ("[T]he Bureau grants credit for time spent in state custody"); see also Reply Brief for Petitioners 7–8.

The majority attempts to escape its self-created anomaly by suggesting that it "need not and do[es] not rule" on the propriety of giving credit for confinement under state law. *Ante*, at 64, n. 5. But that contention simply collapses the majority's house of cards. For either the "text" of the Bail Reform Act limits "official detention" to custody of the Attorney General, in which case the majority adopts an interpretation that even the Attorney General rejects, or the "text" does not limit the meaning of official detention, and then there is absolutely no reason for concluding that court-ordered 24-hour-a-day confinement is not official detention. The majority cannot have it both ways.

Given the anomalous implications of the Court's decision, one may fairly question how the majority justifies its result. It is surely not the plain language of the statute, because the majority's reading requires that a judicially mandated, 24-hour-a-day confinement in a jail-type facility is neither "official" (because it is ordered by a judge and not the Attorney General) nor "detention" (because the judicial order is labeled "release"). Nor does the majority rely on the nature of the facility itself, because the majority concedes that if the Attorney General rather than the court had confined respondent in the exact same facility, respondent's confinement would have been "official detention" under the statute. The majority purports to rely on some sort of *Chevron* deference, *ante*, at 61, but it is indeed an odd sort of deference given that (as I have noted above) the majority adopts an interpretation that the Bureau of Prisons itself has rejected.

The majority suggests at one point that it relies on the history of the interpretation of the word "custody," arguing that Congress did not intend to change the settled meaning of "custody" that existed prior to the Bail Reform Act. However, not one of the cases cited by the majority, *ante*, at 59, stands for the proposition that custody does not include confinement in a jail-type facility. Instead, all of those cases involved situations in which the defendant was *at large*. See *Polakoff* v. *United States*, 489 F. 2d 727, 730 (CA5 1974) (defendant faced "travel and social restrictions and was required to report weekly to a probation officer"); *United States* v. *Robles*, 563 F. 2d 1308, 1309 (CA9 1977) (defendant required to "obey all laws, remain within the jurisdiction unless court permission was granted to travel, obey all court orders, and keep his attorney posted as to his address and employment"); *Ortega* v. *United States*, 510 F. 2d 412, 413

(CA10 1975) ("released on personal recognizance"); *United States* v. *Peterson,* 507 F. 2d 1191, 1192 (CADC 1974) (defendant "at large on conditional release"). Moreover, at least one Court of Appeals (albeit after the passage of the Bail Reform Act) interpreted the word "custody" under § 3568 as including "enforced residence under conditions approaching those of incarceration." *Brown* v. *Rison,* 895 F. 2d 533, 536 (CA9 1990). Thus, though I agree with the majority that Congress intended to incorporate the understanding of "custody" that existed under § 3568, I fail to see how that intention supports the majority's result.

Simply accepting the plain meaning of the statutory text would avoid the anomalies created by the Court's opinion, would effectuate the intent of Congress, and would provide fair treatment for defendants who will otherwise spend more time in custody than Congress has deemed necessary or appropriate. For these reasons, I agree with the persuasive opinion of the Court of Appeals and would affirm its judgment.

MISSOURI ET AL. *v.* JENKINS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93–1823. Argued January 11, 1995—Decided June 12, 1995*

In this 18-year-old school desegregation litigation, see, *e. g., Missouri* v. *Jenkins,* 495 U. S. 33, Missouri challenges the District Court's orders requiring the State (1) to fund salary increases for virtually all instructional and noninstructional staff within the Kansas City, Missouri, School District (KCMSD), and (2) to continue to fund remedial "quality education" programs because student achievement levels were still "at or below national norms at many grade levels." In affirming the orders, the Court of Appeals rejected the State's argument that the salary increases exceeded the District Court's remedial authority because they did not directly address and relate to the State's constitutional violation: its operation, prior to 1954, of a segregated school system within the KCMSD. The Court of Appeals observed, *inter alia,* that the increases were designed to eliminate the vestiges of state-imposed segregation by improving the "desegregative attractiveness" of the district and by reversing "white flight" to the suburbs. The Court of Appeals also approved the District Court's "implici[t]" rejection of the State's request for a determination of partial unitary status, under *Freeman* v. *Pitts,* 503 U. S. 467, 491, with respect to the existing quality education programs.

Held:

1. Respondents' arguments that the State may no longer challenge the District Court's desegregation remedy and that, in any event, the propriety of the remedy is not before this Court are rejected. Because, in *Jenkins,* 495 U. S., at 37, certiorari was granted to review the manner in which this remedy was funded, but denied as to the State's challenge to review the remedial order's scope, this Court resisted the State's efforts to challenge such scope and, thus, neither approved nor disapproved the Court of Appeals' conclusion that the remedy was proper, see, *e. g., id.,* at 53. Here, however, the State has challenged the District Court's approval of across-the-board salary increases as beyond its remedial authority. Because an analysis of the permissible scope of that authority is necessary for a proper determination of whether the

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*Together with *Missouri et al.* v. *Jenkins et al.,* also on certiorari to the same court (see this Court's Rule 12.2).

salary increases exceed such authority, a challenge to the scope of the remedy is fairly included in the question presented for review. See this Court's Rule 14.1 and, *e. g., Procunier* v. *Navarette,* 434 U. S. 555, 560, n. 6. Pp. 83–86.

2. The challenged orders are beyond the District Court's remedial authority. Pp. 86–103.

(a) Although a District Court necessarily has discretion to fashion a remedy for a school district unconstitutionally segregated in law, such remedial power is not unlimited and may not be extended to purposes beyond the elimination of racial discrimination in public schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 22–23. Proper analysis of the orders challenged here must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied absent that conduct, see, *e. g., Milliken* v. *Bradley,* 418 U. S. 717, 746, and their eventual restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution, see, *e. g., Freeman,* 503 U. S., at 489. The factors that must inform a court's discretion in ordering complete or partial relief from a desegregation decree are: (1) whether there has been compliance with the decree in those aspects of the school system where federal supervision is to be withdrawn; (2) whether retention of judicial control is necessary or practicable to achieve compliance in other facets of the system; and (3) whether the district has demonstrated to the public and to the parents and students of the once disfavored race its good-faith commitment to the whole of the decree and to those statutes and constitutional provisions that were the predicate for judicial intervention in the first place. *Id.,* at 491. The ultimate inquiry is whether the constitutional violator has complied in good faith with the decree since it was entered, and whether the vestiges of discrimination have been eliminated to the extent practicable. *Id.,* at 492. Pp. 86–89.

(b) The order approving salary increases, which was grounded in improving the "desegregative attractiveness" of the KCMSD, exceeds the District Court's admittedly broad discretion. The order should have sought to eliminate to the extent practicable the vestiges of prior *de jure* segregation within the KCMSD: a systemwide reduction in student achievement and the existence of 25 racially identifiable schools with a population of over 90% black students. Instead, the District Court created a magnet district of the KCMSD in order to attract nonminority students from the surrounding suburban school districts and to redistribute them within the KCMSD schools. This *inter*district goal is beyond the scope of the *intra*district violation identified by the District Court. See, *e. g., Milliken, supra,* at 746–747. Indeed, the District

Court has found, and the Court of Appeals has affirmed, that the case involved no interdistrict violation that would support interdistrict relief. See, *e. g., Jenkins, supra,* at 37, n. 3. The District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students. See *Milliken,* 418 U. S., at 745. The record does not support the District Court's reliance on "white flight" as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness. See, *e. g., id.,* at 746. Moreover, that pursuit cannot be reconciled with this Court's decisions placing limitations on a district court's remedial authority. See, *e. g., ibid.* Nor are there appropriate limits to the duration of the District Court's involvement. See, *e. g., Freeman, supra,* at 489. Thus, the District Court's pursuit of the goal of "desegregative attractiveness" results in too many imponderables and is too far removed from the task of eliminating the racial identifiability of the schools within the KCMSD. Pp. 89–100.

(c) Similarly, the order requiring the State to continue to fund the quality education programs cannot be sustained. Whether or not KCMSD student achievement levels are still "at or below national norms at many grade levels" clearly is not the appropriate test for deciding whether a previously segregated district has achieved partially unitary status. The District Court should sharply limit, if not dispense with, its reliance on this factor in reconsidering its order, and should instead apply the three-part *Freeman* test. It should bear in mind that the State's role with respect to the quality education programs has been limited to the funding, not the implementation, of those programs; that many of the goals of the quality education plan already have been attained; and that its end purpose is not only to remedy the violation to the extent practicable, but also to restore control to state and local authorities. Pp. 100–102.

11 F. 3d 755 (first case) and 13 F. 3d 1170 (second case), reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post,* p. 103, and THOMAS, J., *post,* p. 114, filed concurring opinions. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 138. GINSBURG, J., filed a dissenting opinion, *post,* p. 175.

John R. Munich, Chief Counsel for Litigation, argued the cause for petitioners State of Missouri et al. With him on the briefs were *Jeremiah W. (Jay) Nixon,* Attorney General, *James R. Layton, Michael J. Fields,* and *Bart A. Matanic,* Assistant Attorneys General, *Carter G. Phillips, Mark D. Hopson,* and *Janet M. Letson.*

Theodore M. Shaw argued the cause for respondents. With him on the briefs for respondents Jenkins et al. were *Arthur A. Benson II, James S. Liebman,* and *Elaine R. Jones. Allen R. Snyder, Patricia A. Brannan, John W. Borkowski, Scott A. Raisher,* and *Frederick O. Wickham* filed a brief for respondents Kansas City, Missouri, School District et al.

Deputy Solicitor General Bender argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Patrick, Irving L. Gornstein, Dennis J. Dimsey,* and *Mark L. Gross.*†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

As this school desegregation litigation enters its 18th year, we are called upon again to review the decisions of the lower courts. In this case, the State of Missouri has challenged the District Court's order of salary increases for virtually all instructional and noninstructional staff within the Kansas City, Missouri, School District (KCMSD) and the District Court's order requiring the State to continue to fund remedial "quality education" programs because student achievement levels were still "at or below national norms at many grade levels."

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†*Mark J. Bredemeier* and *Jerald L. Hill* filed a brief for Icelean Clark et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Christopher A. Hansen, Steven R. Shapiro,* and *Helen Hershkoff;* for the Civic Council of Greater Kansas City by *David F. Oliver;* for the Lawyers' Committee for Civil Rights Under Law by *Jack W. Londen, Michael Cooper,* and *Thomas J. Henderson;* and for James D. Anderson et al. by *Kevin J. Hamilton.*

William L. Taylor and *Dianne M. Pich* filed a brief for the National Urban League et al. as *amici curiae.*

I

A general overview of this litigation is necessary for proper resolution of the issues upon which we granted certiorari. This case has been before the same United States District Judge since 1977. *Missouri* v. *Jenkins,* 491 U. S. 274, 276 (1989) *(Jenkins I).* In that year, the KCMSD, the school board, and the children of two school board members brought suit against the State and other defendants. Plaintiffs alleged that the State, the surrounding suburban school districts (SSD's), and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area. The District Court realigned the KCMSD as a nominal defendant and certified as a class, present and future KCMSD students. The KCMSD brought a cross-claim against the State for its failure to eliminate the vestiges of its prior dual school system.

After a trial that lasted 7½ months, the District Court dismissed the case against the federal defendants and the SSD's, but determined that the State and the KCMSD were liable for an intradistrict violation, *i. e.,* they had operated a segregated school system within the KCMSD. *Jenkins* v. *Missouri,* 593 F. Supp. 1485 (WD Mo. 1984). The District Court determined that prior to 1954 "Missouri mandated segregated schools for black and white children." *Id.,* at 1490. Furthermore, the KCMSD and the State had failed in their affirmative obligations to eliminate the vestiges of the State's dual school system within the KCMSD. *Id.,* at 1504.

In June 1985, the District Court issued its first remedial order and established as its goal the "elimination of all vestiges of state imposed segregation." *Jenkins* v. *Missouri,* 639 F. Supp. 19, 23 (WD Mo. 1985). The District Court determined that "[s]egregation ha[d] caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Id.,* at 24. The District Court made no particularized findings regarding the extent that student achievement had been reduced or what portion of that reduction was attributable to segregation. The District Court also identified 25 schools within the KCMSD that had enrollments of 90% or more black students. *Id.*, at 36.

The District Court, pursuant to plans submitted by the KCMSD and the State, ordered a wide range of quality education programs for all students attending the KCMSD. First, the District Court ordered that the KCMSD be restored to an AAA classification, the highest classification awarded by the State Board of Education. *Id.*, at 26. Second, it ordered that the number of students per class be reduced so that the student-to-teacher ratio was below the level required for AAA standing. *Id.*, at 28–29. The District Court justified its reduction in class size as

> "an essential part of any plan to remedy the vestiges of segregation in the KCMSD. Reducing class size will serve to remedy the vestiges of past segregation by increasing individual attention and instruction, as well as increasing the potential for desegregative educational experiences for KCMSD students by maintaining and attracting non-minority enrollment." *Id.*, at 29.

The District Court also ordered programs to expand educational opportunities for all KCMSD students: full-day kindergarten; expanded summer school; before- and after-school tutoring; and an early childhood development program. *Id.*, at 30–33. Finally, the District Court implemented a state-funded "effective schools" program that consisted of substantial yearly cash grants to each of the schools within the KCMSD. *Id.*, at 33–34. Under the "effective schools" program, the State was required to fund programs at both the 25 racially identifiable schools as well as the 43 other schools within the KCMSD. *Id.*, at 33.

The KCMSD was awarded an AAA rating in the 1987–1988 school year, and there is no dispute that since that time it has "'maintained and greatly exceeded AAA requirements.'" 19 F. 3d 393, 401 (CA8 1994) (Beam, J., dissenting from denial of rehearing en banc). The total cost for these quality education programs has exceeded $220 million. Missouri Department of Elementary and Secondary Education, KCMSD Total Desegregation Program Expenditures (Sept. 30, 1994) (Desegregation Expenditures).

The District Court also set out to desegregate the KCMSD but believed that "[t]o accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task." 639 F. Supp., at 38. Because it had found no interdistrict violation, the District Court could not order mandatory interdistrict redistribution of students between the KCMSD and the surrounding SSD's. *Ibid.;* see also *Milliken* v. *Bradley,* 418 U. S. 717 (1974) *(Milliken I).* The District Court refused to order additional mandatory student reassignments because they would "increase the instability of the KCMSD and reduce the potential for desegregation." 639 F. Supp., at 38. Relying on favorable precedent from the Eighth Circuit, the District Court determined that "[a]chievement of AAA status, improvement of the quality of education being offered at the KCMSD schools, magnet schools, as well as other components of this desegregation plan can serve to maintain and hopefully attract non-minority student enrollment." *Ibid.*

In November 1986, the District Court approved a comprehensive magnet school and capital improvements plan and held the State and the KCMSD jointly and severally liable for its funding. 1 App. 130–193. Under the District Court's plan, every senior high school, every middle school, and one-half of the elementary schools were converted into magnet schools.[1] *Id.,* at 131. The District Court adopted the magnet-school program to "provide a greater educational opportunity to *all* KCMSD students," *id.*, at 131–132, and because it believed "that the proposed magnet plan [was] so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." *Id.*, at 132. The District Court felt that "[t]he long-term benefit of all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment." *Id.*, at 133. Since its inception, the magnet-school program has operated at a cost, including magnet transportation, in excess of $448 million. See Desegregation Expenditures. In April 1993, the District Court considered, but ultimately rejected, the plaintiffs' and the KCMSD's proposal seeking approval of a long-range magnet renewal program that included a 10-year budget of well over $500 million, funded by the State and the KCMSD on a joint-and-several basis. App. to Pet. for Cert. A–123.

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[1] "'Magnet schools,' as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." *Missouri* v. *Jenkins,* 495 U. S. 33, 40, n. 6 (1990).

In June 1985, the District Court ordered substantial capital improvements to combat the deterioration of the KCMSD's facilities. In formulating its capital-improvements plan, the District Court dismissed as "irrelevant" the "State's argument that the present condition of the facilities [was] not traceable to unlawful segregation." 639 F. Supp., at 40. Instead, the District Court focused on its responsibility to "remed[y] the vestiges of segregation" and to "implemen[t] a desegregation plan which w[ould] maintain and attract non-minority enrollment." *Id.*, at 41. The initial phase of the capital-improvements plan cost $37 million. *Ibid.* The District Court also required the KCMSD to present further capital-improvements proposals "in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts." *Ibid.* In November 1986, the District Court approved further capital improvements in order to remove the vestiges of racial segregation and "to . . . attract non-minority students back to the KCMSD." App. to Pet. for Cert. A–133 to A–134.

In September 1987, the District Court adopted, for the most part, KCMSD's long-range capital-improvements plan at a cost in excess of $187 million. *Jenkins* v. *Missouri*, 672 F. Supp. 400, 408 (WD Mo. 1987). The plan called for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools. *Id.*, at 405. The District Court rejected what it referred to as the " 'patch and repair' approach proposed by the State" because it "would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint." *Id.*, at 404. The District Court reasoned that "if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools." *Id.*, at 405. As of 1990, the District Court had ordered $260 million in capital improvements. *Missouri* v. *Jenkins*, 495 U. S. 33, 61 (1990) *(Jenkins II)* (KENNEDY, J., concurring in part and concurring in judgment). Since then, the total cost of capital improvements ordered has soared to over $540 million.

As part of its desegregation plan, the District Court has ordered salary assistance to the KCMSD. In 1987, the District Court initially ordered salary assistance only for teachers within the KCMSD. Since that time, however, the District Court has ordered salary assistance to all but three of the approximately 5,000 KCMSD employees. The total cost of this component of the desegregation remedy since 1987 is over $200 million. See Desegregation Expenditures.

The District Court's desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation. 19 F. 3d, at 397

(Beam, J., dissenting from denial of rehearing en banc). The annual cost per pupil at the KCMSD far exceeds that of the neighboring SSD's or of any school district in Missouri. Nevertheless, the KCMSD, which has pursued a "friendly adversary" relationship with the plaintiffs, has continued to propose ever more expensive programs.[2] As a result, the desegregation costs have escalated and now are approaching an annual cost of $200 million. These massive expenditures have financed

> "high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities." *Jenkins II*, 495 U. S., at 77 (KENNEDY, J., concurring in part and concurring in judgment).

Not surprisingly, the cost of this remedial plan has "far exceeded KCMSD's budget, or for that matter, its authority to tax." *Id.*, at 60. The State, through the operation of joint-and-several liability, has borne the brunt of these costs. The District Court candidly has acknowledged that it has "allowed the District planners to dream" and "provided the mechanism for th[ose] dreams to be realized." App. to Pet. for Cert. A–133. In short, the District Court "has gone to great lengths to provide KCMSD with facilities and opportunities not available anywhere else in the country." *Id.*, at A–115.

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[2] In April 1993, 16 years after this litigation began, the District Court acknowledged that the KCMSD and the plaintiffs had "barely addressed . . . how the KCMSD proposes to ultimately fund the school system developed under the desegregation plan." App. to Pet. for Cert. A–123. In the context of a proposal to extend funding of the magnet-school program for 10 additional years at a cost of over $500 million, the District Court noted that "[t]he District's proposals do not include a viable method of financing any of the programs." *Id.*, at A–140.

II

With this background, we turn to the present controversy. First, the State has challenged the District Court's requirement that it fund salary increases for KCMSD instructional and noninstructional staff. *Id.*, at A–76 to A–93 (District Court's Order of June 15, 1992); *id.*, at A–94 to A–109 (District Court's Order of June 30, 1993); *id.*, at A–110 to A–121 (District Court's Order of July 30, 1993). The State claimed that funding for salaries was beyond the scope of the District Court's remedial authority. *Id.*, at A–86. Second, the State has challenged the District Court's order requiring it to continue to fund the remedial quality education programs for the 1992–1993 school year. *Id.*, at A–69 to A–75 (District Court's Order of June 17, 1992). The State contended that under *Freeman* v. *Pitts*, 503 U. S. 467 (1992), it had achieved partial unitary status with respect to the quality education programs already in place. As a result, the State argued that the District Court should have relieved it of responsibility for funding those programs.

The District Court rejected the State's arguments. It first determined that the salary increases were warranted because "[h]igh quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation', but also to 'ensure that there is no diminution in the quality of its regular academic program.'" App. to Pet. for Cert. A–87 (citations omitted). Its "ruling [was] grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD." *Id.*, at A–90. The District Court did not address the State's *Freeman* arguments; nevertheless, it ordered the State to continue to fund the quality education programs for the 1992–1993 school year. See App. to Pet. for Cert. A–70.

The Court of Appeals for the Eighth Circuit affirmed. 11 F. 3d 755 (1993). It rejected the State's argument that the salary increases did not directly address and relate to the State's constitutional violation and that "low teacher salaries d[id] not flow from any earlier constitutional violations by the State." *Id.,* at 767. In doing so, it observed that "[i]n addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior educational opportunities." *Ibid.;* see also 13 F. 3d 1170, 1172 (1993) (affirming the District Court's June 30, 1993, and July 30, 1993, orders).

The Court of Appeals concluded that the District Court implicitly had rejected the State's *Freeman* arguments in spite of the fact that it had failed "to articulate . . . even a conclusory rejection" of them. 11 F. 3d, at 765. It looked to the District Court's comments from the bench and its later orders to "illuminate the June 1992 order." *Id.,* at 761. The Court of Appeals relied on statements made by the District Court during a May 28, 1992, hearing:

> "The Court's goal was to integrate the Kansas City, Missouri, School District to the *maximum degree possible,* and all these other matters were elements to be used to try to integrate the Kansas City, Missouri, schools so the goal is integration. That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal, and until such time as that goal has been reached, then we have not reached the goal. . . . The goal is to integrate the Kansas City, Missouri, School district. So I think we are wasting our time." 2 App. 482 (emphasis added).

See 11 F. 3d, at 761. Apparently, the Court of Appeals extrapolated from the findings regarding the magnet-school program and later orders and imported those findings wholesale to reject the State's request for a determination of partial unitary status as to the quality education programs. See *id.*, at 761–762. It found significant the District Court's determination that although "there had been a trend of improvement in academic achievement, . . . the school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels." *Ibid.* It went on to say that with respect to quality education, "implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the systemwide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation." *Id.*, at 766.

The Court of Appeals denied rehearing en banc, with five judges dissenting. 19 F. 3d, at 395. The dissent first examined the salary increases ordered by the District Court and characterized "the current effort by the KCMSD and the American Federation of Teachers . . . aided by the plaintiffs, to bypass the collective bargaining process" as "uncalled for" and "probably not an exercise reasonably related to the constitutional violations found by the court." *Id.*, at 399. The dissent also "agree[d] with the [S]tate that logic d[id] not directly relate the pay of parking lot attendants, trash haulers and food handlers . . . to any facet or phase of the desegregation plan or to the constitutional violations." *Ibid.*

Second, the dissent believed that in evaluating whether the KCMSD had achieved partial unitary status in its quality education programs, the District Court and the panel had

> "misrea[d] *Freeman* and create[d] a hurdle to the withdrawal of judicial intervention from public education that has no support in the law. The district court has,

> with the approbation of the panel, imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard." *Id.*, at 400.

The dissent noted that "KCMSD students have in place a system that offers more educational opportunity than anywhere in America," *id.*, at 403, but that the District Court was "'not satisfied that the District has reached anywhere close to its *maximum potential* because the District is still at or below national norms at many grade levels,'" *ibid.* (emphasis added). The dissent concluded that this case, "as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication." *Id.*, at 404.

Because of the importance of the issues, we granted certiorari to consider the following: (1) whether the District Court exceeded its constitutional authority when it granted salary increases to virtually all instructional and noninstructional employees of the KCMSD, and (2) whether the District Court properly relied upon the fact that student achievement test scores had failed to rise to some unspecified level when it declined to find that the State had achieved partial unitary status as to the quality education programs. 512 U. S. 1287 (1994).

III

Respondents argue that the State may no longer challenge the District Court's remedy, and in any event, the propriety of the remedy is not before the Court. Brief for Respondents KCMSD et al. 40–49; Brief for Respondents Jenkins et al. 23. We disagree on both counts. In *Jenkins II*, we granted certiorari to review the manner in which the District Court had funded this desegregation remedy. 495 U. S., at 37. Because we had denied certiorari on the State's challenge to review the scope of the remedial order, we resisted the State's efforts to challenge the scope of the remedy. *Id.*, at 53; cf. *id.*, at 80 (KENNEDY, J., concurring in part and concurring in judgment). Thus, we neither "approv[ed]" nor "disapprov[ed] the Court of Appeals' conclusion that the District Court's remedy was proper." *Id.*, at 53.

Here, however, the State has challenged the District Court's approval of across-the-board salary increases for instructional and noninstructional employees as an action beyond its remedial authority. Pet. for Cert. i.[3] An analysis of the permissible scope of the District Court's remedial authority is necessary for a proper determination of whether the order of salary increases is beyond the District Court's remedial authority, see *Milliken I*, 418 U. S., at 738–740, 745, and thus, it is an issue subsidiary to our ultimate inquiry. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 537 (1992). Given that the District Court's basis for its salary order was grounded in "improving the desegregative attractiveness of the KCMSD," App. to Pet. for Cert. A–90, we must consider the propriety of that reliance in order to resolve properly the State's challenge to that order. We conclude that a challenge to the scope of the District Court's remedy is fairly included in the question presented. See this Court's Rule 14.1; *Procunier* v. *Navarette*, 434 U. S. 555, 560, n. 6 (1978) ("Since consideration of these issues is essential to analysis of the Court of Appeals' [decision] we shall also treat these questions as subsidiary issues 'fairly comprised' by the question presented"); see also *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980) (opinion of Stewart, J.) (Where the determination of a question "is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari"); cf. *Yee, supra*, at 536–537.

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[3] "Whether a federal court order granting salary increases to virtually every employee of a school district—including non-instructional personnel—as part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?" Pet. for Cert. i.

JUSTICE SOUTER argues that our decision to review the scope of the District Court's remedial authority is both unfair and imprudent. *Post,* at 147. He claims that factors such as our failure to grant certiorari on the State's challenge to the District Court's remedial authority in 1988 "lulled [respondents] into addressing the case without sufficient attention to the foundational issue, and their lack of attention has now infected the Court's decision." *Post,* at 139. JUSTICE SOUTER concludes that we have "decide[d] the issue without any warning to respondents." *Post,* at 147. These arguments are incorrect.

Of course, "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U. S. 482, 490 (1923). *A fortiori,* far from lulling respondents into a false sense of security, our previous decision in *Jenkins* v. *Missouri* put respondents on notice that the Court had not affirmed the validity of the District Court's remedy, 495 U. S., at 53, and that at least four Justices of the Court questioned that remedy, *id.,* at 75–80 (KENNEDY, J., concurring in part and concurring in judgment).

With respect to the specific orders at issue here, the State has once again challenged the scope of the District Court's remedial authority. The District Court was aware of this fact. See App. to Pet. for Cert. A–86 ("The State claims that the Court should not approve desegregation funding for salaries because such funding would be beyond the scope of the Court's remedial authority") (District Court's June 25, 1992, order); *id.,* at A–97 ("The State has argued repeatedly and currently on appeal that the salary component is not a valid component of the desegregation remedy") (District

Court's June 30, 1993, order). The Court of Appeals also understood that the State had renewed this challenge. See 11 F. 3d, at 766 ("The State argues first that the salary increase remedy sought exceeded that necessary to remedy the constitutional violations, and alternatively, that if the district court had lawful authority to impose the increases, it abused its discretion in doing so"); *id.*, at 767 ("The State's legal argument is that the district court should have denied the salary increase funding because it is contrary to *Milliken* [v. *Bradley,* 433 U. S. 267 (1977),] and *Swann* [v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971),] in that it does not directly address and relate to the State's constitutional violation"); 13 F. 3d, at 1172 ("We reject the State's argument that the salary order is contrary to *Milliken II* and *Swann*"). The State renewed this same challenge in its petition for certiorari, Pet. for Cert. i, and argued here that the District Court's salary orders were beyond the scope of its remedial authority. Brief for Petitioners 27–32; Reply Brief for Petitioners 6–12. In the 100 pages of briefing provided by respondents, they have argued that the State's challenge to the scope of the District Court's remedial authority is not fairly presented *and* is meritless. See Brief for Respondents KCMSD et al. 40–49; Brief for Respondents Jenkins et al. 2–21, 44–49; cf. Reply Brief for Petitioners 2 ("[R]espondents . . . urge the Court to dismiss the writ as improvidently granted. This is not surprising; respondents cannot defend the excesses of the courts below").

In short, the State has challenged the scope of the District Court's remedial authority. The District Court, the Court of Appeals, and respondents have recognized this to be the case. Contrary to JUSTICE SOUTER's arguments, there is no unfairness or imprudence in deciding issues that have been passed upon below, are properly before us, and have been briefed by the parties. We turn to the questions presented.

Almost 25 years ago, in *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971), we dealt with the authority of a district court to fashion remedies for a school district that had been segregated in law in violation of the Equal Protection Clause of the Fourteenth Amendment. Although recognizing the discretion that must necessarily adhere in a district court in fashioning a remedy, we also recognized the limits on such remedial power:

> "[E]limination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of the school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown* [v. *Board of Education*, 347 U. S. 483 (1954),] to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." *Id.*, at 22–23.

Three years later, in *Milliken I*, 418 U. S. 717 (1974), we held that a District Court had exceeded its authority in fashioning interdistrict relief where the surrounding school districts had not themselves been guilty of any constitutional violation. *Id.*, at 746–747. We said that a desegregation remedy "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, at 746. "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.*, at 745. We also rejected "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the makeup of the school district's population and however neutrally the district lines have been drawn and administered." *Id.*, at 747, n. 22; see also *Freeman*, 503 U. S., at 474 ("[A] critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole").

Three years later, in *Milliken* v. *Bradley,* 433 U. S. 267 (1977) *(Milliken II),* we articulated a three-part framework derived from our prior cases to guide district courts in the exercise of their remedial authority.

> "In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 16. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' *Milliken I,* 418 U. S., at 738. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' *Id.,* at 746. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.,* at 280–281 (footnotes omitted).

We added that the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Id.,* at 281–282. In applying these principles, we have identified "student assignments, . . . 'faculty, staff, transportation, extracurricular activities and facilities'" as the most important indicia of a racially segregated school system. *Board of Ed. of Oklahoma City Public Schools* v. *Dowell,* 498 U. S. 237, 250 (1991) (quoting *Green* v. *School Bd. of New Kent Cty.,* 391 U. S. 430, 435 (1968)).

Because "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination," *Dowell, supra,* at 247, we also have considered the showing that must be made by a school district operating under a desegregation order for complete or partial relief from that order. In *Freeman,* we stated that

> "[a]mong the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: [1] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [3] whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the courts' decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." 503 U. S., at 491.

The ultimate inquiry is "'whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.*, at 492 (quoting *Dowell, supra,* at 249–250).

Proper analysis of the District Court's orders challenged here, then, must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct and their eventual restoration of "state and local authorities to the control of a school system that is operating in compliance with the Constitution." 503 U. S., at 489. We turn to that analysis.

The State argues that the order approving salary increases is beyond the District Court's authority because it was crafted to serve an "interdistrict goal," in spite of the fact that the constitutional violation in this case is "intradistrict" in nature. Brief for Petitioners 19. "[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken II, supra,* at 280; *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U. S. 424, 434 (1976) ("'[T]here are limits' beyond which a court may not go in seeking to dismantle a dual school system"). The proper response to an intradistrict violation is an intradistrict remedy, see *Milliken I, supra,* at 746–747; *Milliken II, supra,* at 280, that serves to eliminate the racial identity of the schools within the affected school district by eliminating, as far as practicable, the vestiges of *de jure* segregation in all facets of their operations. See *Dowell, supra,* at 250; see also *Swann,* 402 U. S., at 18–19; *Green, supra,* at 435.

Here, the District Court has found, and the Court of Appeals has affirmed, that this case involved no interdistrict constitutional violation that would support interdistrict relief. *Jenkins II,* 495 U. S., at 37, n. 3 ("The District Court also found that none of the alleged discriminatory actions had resulted in lingering interdistrict effects and so dismissed the suburban school districts and denied interdistrict relief"); *id.,* at 76 (KENNEDY, J., concurring in part and concurring in judgment) ("[T]here was no interdistrict constitutional violation that would support mandatory interdistrict relief").[4] Thus, the proper response by the District Court should have been to eliminate to the extent practicable the vestiges of prior *de jure* segregation within the KCMSD: a systemwide reduction in student achievement and the existence of 25 racially identifiable schools with a population of over 90% black students. 639 F. Supp., at 24, 36.

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[4] See also *Jenkins* v. *Missouri,* 931 F. 2d 1273, 1274 (CA8 1991) ("[T]he district court in September 1984 held the State defendants and the KCMSD liable for intradistrict segregation"); *Jenkins* v. *Missouri,* 931 F. 2d 470, 475 (CA8 1991) ("In a June 5, 1984, order the district court rejected claims of interdistrict violations"); *Jenkins* v. *Missouri,* 838 F. 2d 260, 264 (CA8 1988) ("In this case, the plaintiffs made unsuccessful claims against the State as well as the suburban, federal, and Kansas defendants for interdistrict relief. They also made successful intradistrict claims against the State and KCMSD"); *Jenkins* v. *Missouri,* 807 F. 2d 657, 669–670 (CA8 1986) (en banc) ("[T]he argument that KCMSD officially sanctioned suburban flight looks first to KCMSD's violation which the district court clearly found to be only intradistrict in nature").

The District Court and Court of Appeals, however, have felt that because the KCMSD's enrollment remained 68.3% black, a purely *intra*district remedy would be insufficient. *Id.*, at 38; *Jenkins* v. *Missouri*, 855 F. 2d 1296, 1302 (CA8 1988) ("*[V]oluntary* interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district"). But, as noted in *Milliken I*, 418 U. S. 717 (1974), we have rejected the suggestion "that schools which have a majority of Negro students are not 'desegregated' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered." *Id.*, at 747, n. 22; see *Milliken II*, 433 U. S., at 280, n. 14 ("[T]he Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more"); *Spangler*, *supra*, at 434.[5]

Instead of seeking to remove the racial identity of the various schools within the KCMSD, the District Court has set out on a program to create a school district that was equal to or superior to the surrounding SSD's. Its remedy has focused on "desegregative attractiveness," coupled with "suburban comparability." Examination of the District Court's reliance on "desegregative attractiveness" and "suburban comparability" is instructive for our ultimate resolution of the salary-order issue.

The purpose of desegregative attractiveness has been not only to remedy the systemwide reduction in student achievement, but also to attract nonminority students not presently enrolled in the KCMSD. This remedy has included an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district. The District Court's remedial orders have converted every senior high school, every middle school, and one-half of the elementary schools in the KCMSD into "magnet" schools. The District Court's remedial order has all but made the KCMSD itself into a magnet district.

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[5] See also *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 432 (1968) (approving a desegregation plan which had a racial composition of 57% black and 43% white); *Wright* v. *Council of Emporia*, 407 U. S. 451, 457 (1972) (approving a desegregation plan which had a racial composition of 66% black and 34% white); *United States* v. *Scotland Neck City Bd. of Ed.*, 407 U. S. 484, 491, n. 5 (1972) (approving implicitly a desegregation plan which had a racial composition of 77% black and 22% white).

We previously have approved of intradistrict desegregation remedies involving magnet schools. See, *e. g., Milliken II, supra,* at 272. Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis, without requiring extensive busing and redrawing of district boundary lines. Cf. *Jenkins II, supra,* at 59–60 (KENNEDY, J., concurring in part and concurring in judgment) (citing *Milliken II, supra,* at 272). As a component in an intradistrict remedy, magnet schools also are attractive because they promote desegregation while limiting the withdrawal of white student enrollment that may result from mandatory student reassignment. See 639 F. Supp., at 37; cf. *United States* v. *Scotland Neck City Bd. of Ed.,* 407 U. S. 484, 491 (1972).

The District Court's remedial plan in this case, however, is not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools within the KCMSD. Instead, its purpose is to attract nonminority students from outside the KCMSD schools. But this *inter*district goal is beyond the scope of the *intra*district violation identified by the District Court. In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students. 639 F. Supp., at 38 ("'[B]ecause of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities,' any *mandatory* plan which would go beyond the boundary lines of KCMSD goes far beyond the nature and extent of the constitutional violation [that] this Court found existed").

In *Milliken I* we determined that a desegregation remedy that would require mandatory interdistrict reassignment of students throughout the Detroit metropolitan area was an impermissible interdistrict response to the intradistrict violation identified. 418 U. S., at 745. In that case, the lower courts had ordered an interdistrict remedy because " 'any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.' " *Id.*, at 735. We held that before a district court could order an interdistrict remedy, there must be a showing that "racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation." *Id.*, at 745. Because the record "contain[ed] evidence of *de jure* segregated conditions only in the Detroit Schools" and there had been "no showing of significant violation by the 53 outlying school districts and no evidence of interdistrict violation or effect," we reversed the District Court's grant of interdistrict relief. *Ibid.*

Justice Stewart provided the Court's fifth vote and wrote separately to underscore his understanding of the decision. In describing the requirements for imposing an "interdistrict" remedy, Justice Stewart stated: "Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines; by transfer of school units between districts; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for the transfer of pupils across district lines or for restructuring of district lines might well be appropriate. In this case, however, no such interdistrict violation was shown." *Id.*, at 755 (concurring opinion) (citations omitted). Justice Stewart concluded that the Court properly rejected the District Court's interdistrict remedy because "[t]here were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort." *Id.*, at 757.

What we meant in *Milliken I* by an interdistrict violation was a violation that caused segregation between adjoining districts. Nothing in *Milliken I* suggests that the District Court in that case could have circumvented the limits on its remedial authority by requiring the State of Michigan, a constitutional violator, to implement a magnet program designed to achieve the same interdistrict transfer of students that we held was beyond its remedial authority. Here, the District Court has done just that: created a magnet district of the KCMSD in order to serve the *inter*district goal of attracting nonminority students from the surrounding SSD's and redistributing them within the KCMSD. The District Court's pursuit of "desegregative attractiveness" is beyond the scope of its broad remedial authority. See *Milliken II*, 433 U. S., at 280.

Respondents argue that the District Court's reliance upon desegregative attractiveness is justified in light of the District Court's statement that segregation has "led to white flight from the KCMSD to suburban districts." 1 App. 126; see Brief for Respondents KCMSD et al. 44–45, and n. 28; Brief for Respondents Jenkins et al. 47–49.[6] The lower courts' "findings" as to "white flight" are both inconsistent internally,[7] and inconsistent with the typical supposition, bolstered here by the record evidence, that "white flight" may result from desegregation, not *de jure* segregation.[8] The United States, as *amicus curiae,* argues that the District Court's finding that "*de jure* segregation in the KCMSD caused white students to leave the system . . . is not inconsistent with the district court's earlier conclusion that the suburban districts did nothing to cause this white flight and therefore could not be included in a mandatory interdistrict remedy." Brief for United States as *Amicus Curiae* 19, n. 2; see also *post,* at 160–164. But the District Court's earlier findings, affirmed by the Court of Appeals, were not so limited:

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[6] Prior to 1954, Missouri mandated segregated schools for black and white children. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1490 (WD Mo. 1984). Immediately after the Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the State's Attorney General issued an opinion declaring the provisions that mandated segregation unenforceable. 593 F. Supp., at 1490. In the 1954–1955 school year, 18.9% of the KCMSD's students were black. 807 F. 2d, at 680. The KCMSD became 30% black in the 1961–1962 school year, 40% black in the 1965–1966 school year, and 60% black in the 1975–1976 school year. *Ibid.* In 1977, the KCMSD implemented the 6C desegregation plan in order to ensure that each school within the KCMSD had a minimum minority enrollment of 30%. *Jenkins*

> "[C]ontrary to the argument of [plaintiffs] that the [district court] looked only to the culpability of the SSDs, the scope of the order is far broader. . . . It noted that only the schools in one district were affected and that the remedy must be limited to that system. In examining the cause and effect issue, the court noted that 'not only is plaintiff's evidence here blurred as to cause and

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v. *Missouri,* 639 F. Supp. 19, 35 (WD Mo. 1985). Overall enrollment in KCMSD decreased by 30% from the time that the 6C plan first was implemented until 1986. *Id.,* at 36. During the same time period, white enrollment decreased by 44%. *Ibid.*

[7] Compare n. 4, *supra,* and *Jenkins,* 807 F. 2d, at 662 ("[N]one of the alleged discriminatory actions committed by the State or the federal defendants ha[s] caused any significant current interdistrict segregation"), with *Jenkins* v. *Missouri,* 855 F. 2d 1295, 1302 (CA8 1988) ("These holdings are bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight").

[8] "During the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools." 1 App. 239; see also *Scotland Neck City Bd. of Ed.,* 407 U. S., at 491 (recognizing that implementation of a desegregation remedy may result in "white flight").

> effect, there is no "careful delineation of the extent of the effect."' . . . The district court thus dealt not only with the issue whether the SSDs were constitutional violators but also whether there were significant interdistrict segregative effects. . . . When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of Milliken had not been met." *Jenkins* v. *Missouri,* 807 F. 2d 657, 672 (CA8 1986) (affirming, by an equally divided court, the District Court's findings and conclusion that there was no interdistrict violation or interdistrict effect) (en banc).[9]

In *Freeman,* we stated that "[t]he vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied." 503 U. S., at 496. The record here does not support the District Court's reliance on "white flight" as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness. See *Milliken I,* 418 U. S., at 746; see also *Dayton Bd. of Ed.* v. *Brinkman,* 433 U. S. 406, 417 (1977) *(Dayton I).*

JUSTICE SOUTER claims that our holding effectively overrules *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). See also Brief for American Civil Liberties Union et al. as *Amici Curiae* 18–20. In *Gautreaux,* the Federal Department of

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[9] JUSTICE SOUTER construes the Court of Appeals' determination to mean that the violations by the State and the KCMSD did not cause segregation within the limits of each of the SSD's. *Post,* at 163–164. But the Court of Appeals would not have decided this question at the behest of these plaintiffs—present and future KCMSD students—who have no standing to challenge segregation within the confines of the SSD's. Cf. *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 560–561 (1992). Ergo, the Court of Appeals meant exactly what it said: the requirements of *Milliken I* had not been met because the District Court's specific findings "negate current significant interdistrict effects." *Jenkins,* 807 F. 2d, at 672.

Housing and Urban Development (HUD) was found to have participated, along with a local housing agency, in establishing and maintaining a racially segregated public housing program. 425 U. S., at 286–291. After the Court of Appeals ordered " 'the adoption of a comprehensive metropolitan area plan,' " *id.*, at 291, we granted certiorari to consider the "permissibility in light of *[Milliken I]* of 'inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.' " *Gautreaux, supra,* at 292. Because the "relevant geographic area for purposes of the [plaintiffs'] housing options [was] the Chicago housing market, not the Chicago city limits," 425 U. S., at 299, we concluded that "a metropolitan area remedy . . . [was] not impermissible as a matter of law," *id.*, at 306. Cf. *id.*, at 298, n. 13 (distinguishing *Milliken I,* in part, because prior cases had established that racial segregation in schools is "to be dealt with in terms of 'an established geographic and administrative school system' ").

In *Gautreaux,* we did not obligate the District Court to "subjec[t] HUD to measures going beyond the geographical or political boundaries of its violation." *Post,* at 171–172. Instead, we cautioned that our holding "should not be interpreted as requiring a metropolitan area order." *Gautreaux,* 425 U. S., at 306. We reversed appellate factfinding by the Court of Appeals that would have mandated a metropolitan-area remedy, see *id.*, at 294–295, n. 11, and remanded the case back to the District Court " 'for additional evidence and for further consideration of the issue of metropolitan area relief,' " *id.*, at 306.

Our decision today is fully consistent with *Gautreaux.* A district court seeking to remedy an *intra*district violation that has not "directly caused" significant interdistrict effects, *Milliken I, supra,* at 744–745, exceeds its remedial authority if it orders a remedy with an interdistrict purpose. This conclusion follows directly from *Milliken II,* decided one year after *Gautreaux,* where we reaffirmed the bedrock principle that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." 433 U. S., at 282. In *Milliken II,* we also emphasized that "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.,* at 280–281. *Gautreaux,* however, involved the imposition of a remedy upon a federal agency. See 425 U. S., at 292, n. 9. Thus, it did not raise the same federalism concerns that are implicated when a federal court issues a remedial order against a State. See *Milliken II, supra,* at 280–281.

The District Court's pursuit of "desegregative attractiveness" cannot be reconciled with our cases placing limitations on a district court's remedial authority. It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of nonminority students not presently attending schools in the KCMSD will choose to enroll in those schools. Under this reasoning, however, every increased expenditure, whether it be for teachers, noninstructional employees, books, or buildings, will make the KCMSD in some way more attractive, and thereby perhaps induce nonminority students to enroll in its schools. But this rationale is not susceptible to any objective limitation. Cf. *Milliken II, supra,* at 280 (remedial decree "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct' "). This case provides numerous examples demonstrating the limitless authority of the District Court operating under this rationale. See, *e. g.,* App. to Pet. for Cert. A–115 (The District Court has recognized that it has "provide[d] the KCMSD with facilities and opportunities not available anywhere else in the country"); *id.,* at A–140 ("The District has repeatedly requested that the [District Court] provide extravagant programs based on the hopes that they will succeed in the desegregation effort"). In short, desegregative attractiveness has been used "as the hook on which to hang numerous policy choices about improving the quality of education in general within the KCMSD." *Jenkins II*, 495 U. S., at 76 (KENNEDY, J., concurring in part and concurring in judgment).

Nor are there limits to the duration of the District Court's involvement. The expenditures per pupil in the KCMSD currently far exceed those in the neighboring SSD's. 19 F. 3d, at 399 (Beam, J., dissenting from denial of rehearing en banc) (per-pupil costs within the SSD's, excluding capital costs, range from $2,854 to $5,956; per-pupil costs within the KCMSD, excluding capital costs, are $9,412); Brief for Respondent KCMSD et al. 18, n. 5 (arguing that per-pupil costs in the KCMSD, excluding capital costs, are $7,665.18). Sixteen years after this litigation began, the District Court recognized that the KCMSD has yet to offer a viable method of financing the "wonderful school system being built." App. to Pet. for Cert. A–124; cf. *Milliken II, supra,* at 293 (Powell, J., concurring in judgment) ("Th[e] parties . . . have now joined forces apparently for the purpose of extracting funds from the state treasury"). Each additional program ordered by the District Court—and financed by the State—to increase the "desegregative attractiveness" of the school district makes the KCMSD more and more dependent on additional funding from the State; in turn, the greater the KCMSD's dependence on state funding, the greater its reliance on continued supervision by the District Court. But our cases recognize that local autonomy of school districts is a vital national tradition, *Dayton I*, 433 U. S., at 410, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution. See *Freeman*, 503 U. S., at 489; *Dowell*, 498 U. S., at 247.

The District Court's pursuit of the goal of "desegregative attractiveness" results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court. In this posture, we conclude that the District Court's order of salary increases, which was "grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD," App. to Pet. for Cert. A–90, is simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation. See *Milliken II*, 433 U. S., at 280.

Similar considerations lead us to conclude that the District Court's order requiring the State to continue to fund the quality education programs because student achievement levels were still "at or below national norms at many grade levels" cannot be sustained. The State does not seek from this Court a declaration of partial unitary status with respect to the quality education programs. Reply Brief for Petitioners 3. It challenges the requirement of indefinite funding of a quality education program until national norms are met, based on the assumption that while a mandate for significant educational improvement, both in teaching and in facilities, may have been justified originally, its indefinite extension is not.

Our review in this respect is needlessly complicated because the District Court made no findings in its order approving continued funding of the quality education programs. See App. to Pet. for Cert. A–69 to A–75. Although the Court of Appeals later recognized that a determination of partial unitary status requires "careful factfinding and detailed articulation of findings," 11 F. 3d, at 765, it declined to remand to the District Court. Instead it attempted to assemble an adequate record from the District Court's statements from the bench and subsequent orders. *Id.*, at 761. In one such order relied upon by the Court of Appeals, the District Court stated that the KCMSD had not reached anywhere close to its "maximum potential because the District is still at or below national norms at many grade levels." App. to Pet. for Cert. A–131.

But this clearly is not the appropriate test to be applied in deciding whether a previously segregated district has achieved partially unitary status. See *Freeman, supra,* at 491; *Dowell,* 498 U. S., at 249–250. The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable. Under our precedents, the State and the KCMSD are "entitled to a rather precise statement of [their] obligations under a desegregation decree." *Id.*, at 246. Although the District Court has determined that "[s]egregation has caused a system wide *reduction* in achievement in the schools of the KCMSD," 639 F. Supp., at 24, it never has identified the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs. Cf. *Dayton I, supra,* at 420.[10]

In reconsidering this order, the District Court should apply our three-part test from *Freeman* v. *Pitts, supra,* at 491. The District Court should consider that the State's role with respect to the quality education programs has been limited to the funding, not the implementation, of those programs. As all the parties agree that improved achievement on test scores is not necessarily required for the State to achieve partial unitary status as to the quality education programs, the District Court should sharply limit, if not dispense with, its reliance on this factor. Brief for Respondents KCMSD et al. 34–35; Brief for Respondents Jenkins et al. 26. Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, *Freeman,* 503 U. S., at 494–495, so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. See *Spangler,* 427 U. S., at 434; *Swann,* 402 U. S., at 22. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own.

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[10] To the extent that the District Court has adopted the quality education program to further the goal of desegregative attractiveness, that goal is no longer valid. See *supra,* at 91–100.

The District Court also should consider that many goals of its quality education plan already have been attained: the KCMSD now is equipped with "facilities and opportunities not available anywhere else in the country." App. to Pet. for Cert. A–115. KCMSD schools received an AAA rating eight years ago, and the present remedial programs have been in place for seven years. See 19 F. 3d, at 401 (Beam, J., dissenting from denial of rehearing en banc). It may be that in education, just as it may be in economics, a "rising tide lifts all boats," but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation. See *Milliken II, supra,* at 287. Minority students in kindergarten through grade 7 in the KCMSD always have attended AAA-rated schools; minority students in the KCMSD that previously attended schools rated below AAA have since received remedial education programs for a period of up to seven years.

On remand, the District Court must bear in mind that its end purpose is not only "to remedy the violation" to the extent practicable, but also "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman, supra,* at 489.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

Because "[t]he mere fact that one question must be answered before another does not insulate the former from Rule 14.1(a)," *Lebron* v. *National Railroad Passenger Corporation,* 513 U. S. 374, 404 (1995) (O'CONNOR, J., dissenting), I reject the State's contention that the propriety of the District Court's remedy is fairly included in the question whether student achievement is a valid measure of partial unitary status as to the quality education program, Brief for Petitioners 18.

The State, however, also challenges the District Court's order setting salaries for all but 3 of the 5,000 persons employed by the Kansas City, Missouri, School District (KCMSD). In that order, the court stated: "[T]he basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff." App. to Pet. for Cert. A–90. The question presented in the petition for certiorari asks whether the order comports with our cases requiring that remedies "address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution," Pet. for Cert. i. Thus, the State asks not only whether salary increases are an appropriate means to achieve the District Court's goal of desegregative attractiveness, but also whether that goal itself legitimately relates to the predicate constitutional violation. The propriety of desegregative attractiveness as a remedial purpose, therefore, is not simply an issue "prior to the clearly presented question," *Lebron, supra,* at 382; it is an issue presented in the question itself and, as such, is one that we appropriately and necessarily consider in answering that question.

Beyond the plain words of the question presented, the State's opening brief placed respondents on notice of its argument; fully 25 of the State's 30 pages of discussion were devoted to desegregative attractiveness and suburban comparability. See Brief for Petitioners 19–45. Such focus should not come as a surprise. At every stage of this litigation, as the Court notes, *ante*, at 85–86, the State has questioned whether the salary increase order exceeded the nature and scope of the constitutional violation. In disposing of the argument, the lower courts explicitly relied on the need for desegregative attractiveness and suburban comparability. See, *e. g.*, 13 F. 3d, 1170, 1172 (CA8 1993) ("The significant finding of the court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation orders, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD"); 11 F. 3d 755, 767 (CA8 1993) ("In addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior educational opportunities").

Given the State's persistence and the specificity of the lower court decisions, respondents would have ignored the State's arguments on white flight and desegregative attractiveness at their own peril. But they did not do so, and instead engaged those arguments on the merits. See Brief for Respondents KCMSD et al. 44–49; Brief for Respondents Jenkins et al. 41–49. Perhaps the response was not made as artfully and completely as the dissenting Justices would like, but it was made nevertheless; whatever the cause of respondents' supposed failure to appreciate "what was really at stake," *post*, at 139 (SOUTER, J., dissenting), it is certainly not lack of fair notice.

Given such notice, there is no unfairness to the Court resolving the issue. Unlike *Bray* v. *Alexandria Women's*

Health Clinic, 506 U. S. 263 (1993), for example, where in order to decide a particular question, one would have had to "find in the complaint claims that the respondents themselves have admitted are not there; . . . resolve a question not presented to, or ruled on by, any lower court; . . . revise the rule that it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented; and . . . penalize the parties for not addressing an issue on which the Court specifically denied supplemental briefing," *id.*, at 280–281, in this case one need only read the opinions below to see that the question of desegregative attractiveness was presented to and passed upon by the lower courts; the petition for certiorari to see that it was properly presented; and the briefs to see that it was fully argued on the merits. If it could be thought that deciding the question in *Bray* presented no "unfairness" because it "was briefed, albeit sparingly, by the parties prior to the first oral argument," *id.*, at 291 (SOUTER, J., concurring in judgment in part and dissenting in part), there should hardly be cause to cry foul here. The Court today transgresses no bounds of orderly adjudication in resolving a genuine dispute that is properly presented for its decision.

On the merits, the Court's resolution of the dispute comports with *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). There, we held that there is no "*per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred," *id.*, at 298. This holding follows from our judgment in *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)*, that an interdistrict remedy is permissible, but only upon a showing that "there has been a constitutional violation within one district that produces a significant segregative effect in another district," *id.*, at 745. The *per se* rule that the petitioner urged upon the Court in *Gautreaux* would have erected an "arbitrary and mechanical" shield at the city limits, 425 U. S., at

300, and contradicted the holding in *Milliken I* that remedies may go beyond the boundaries of the constitutional violator. *Gautreaux*, however, does not eliminate the requirement of *Milliken I* that such territorial transgression is permissible only upon a showing that the intradistrict constitutional violation produced significant interdistrict segregative effects; if anything, our opinion repeatedly affirmed that principle, see *Gautreaux*, *supra*, at 292–294, 296, n. 12. More important for our purposes here, *Gautreaux* in no way contravenes the underlying principle that the scope of desegregation remedies, even those that are solely intradistrict, is "determined by the nature and extent of the constitutional violation." *Milliken I*, *supra*, at 744 (citing *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971)). *Gautreaux* simply does not give federal courts a blank check to impose unlimited remedies upon a constitutional violator.

As an initial matter, *Gautreaux* itself may not even have concerned a case of interdistrict relief, at least not in the sense that *Milliken I* and other school desegregation cases have understood it. Our opinion made clear that the authority of the Department of Housing and Urban Development (HUD) extends beyond the Chicago city limits, see *Gautreaux*, 425 U. S., at 298–299, n. 14, and that HUD's own administrative practice treated the Chicago metropolitan area as an undifferentiated whole, *id.*, at 299. Thus, "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits." *Ibid.* Because the relevant district is the greater metropolitan area, drawing the remedial line at the city limits would be "arbitrary and mechanical." *Id.*, at 300.

JUSTICE SOUTER, *post*, at 169–170, makes much of how HUD phrased the question presented: whether it is appropriate to grant "'inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.'" *Gautreaux*, *supra*, at 292. HUD obviously had an interest in phrasing the question thus, since doing so emphasizes the alleged deviation from *Milliken I*. But the Court was free to reject HUD's characterization of the relevant district, which it did:

> "The housing market area 'usually extends beyond the city limits' and in the larger markets 'may extend into several adjoining counties.' . . . An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with 'the nature and extent of the constitutional violation.'" 425 U. S., at 299–300 (quoting *Milliken I*, *supra*, at 744).

In light of this explicit holding, any suggestion that *Gautreaux* dispensed with the predicates of *Milliken I* for interdistrict relief rings hollow.

This distinction notwithstanding, the dissent emphasizes a footnote in *Gautreaux*, in which we reversed the finding by the Court of Appeals that "either an interdistrict violation or an interdistrict segregative effect may have been present," 425 U. S., at 294, n. 11, and argues that implicit in that holding is a suggestion that district lines may be ignored even absent a showing of interdistrict segregative effects, *post*, at 173. But no footnote is an island, entire of itself, and our statement in footnote 11 must be read in context. As explained above, we rejected the petitioner's categorical suggestion that "court-ordered metropolitan area relief in this case would be impermissible as a matter of law," 425 U. S., at 305. But the Court of Appeals had gone too far the other way, suggesting that the District Court had to consider metropolitan area relief because the conditions of *Milliken I*—*i. e.*, interdistrict violation or significant interdistrict segregative effects—had been established as a factual matter. We reversed these ill-advised findings by the appellate court in order to preserve to the District Court its proper role, acknowledged by the dissent, *post,* at 173–174, n. 8, of finding the necessary facts and exercising its discretion accordingly. Indeed, in footnote 11 itself, we repeated the requirement of a "significant segregative effect in another district," *Milliken I,* 418 U. S., at 745, and held that the Court of Appeals' "unsupported speculation falls far short of the demonstration" required, *Gautreaux, supra,* at 295, n. 11. There would have been little need to overrule the Court of Appeals expressly on these factual matters if they were indeed irrelevant.

It is this reading of *Hills* v. *Gautreaux*—as an affirmation of, not a deviation from, *Milliken I*—that the Court of Appeals itself adopted in an earlier phase of this litigation: "*Milliken* and *Hills* make clear that we may grant interdistrict relief only to remedy a constitutional violation by the SSD [suburban school district], or to remedy an interdistrict effect in the SSD caused by a constitutional violation in KCMSD." *Jenkins* v. *Missouri,* 807 F. 2d 657, 672 (CA8 1986) (en banc). Perhaps *Gautreaux* was "mentioned only briefly" by the respondents, *post,* at 174, because the case may actually lend support to the State's argument.

Absent *Gautreaux,* the dissent hangs on the semantic distinction that "the District Court did not mean by an 'intradistrict violation' what the Court apparently means by it today. The District Court meant that the violation within the KCMSD had not led to segregation outside of it, and that no other school districts had played a part in the violation. It did not mean that the violation had not produced effects of any sort beyond the district." *Post,* at 159. The relevant inquiry under *Milliken I* and *Gautreaux,* however, is not whether the intradistrict violation "produced effects of any sort beyond the district," but rather whether such violation caused "significant segregative effects" across district boundaries, *Milliken I, supra,* at 745. When the Court of Appeals affirmed the District Court's initial remedial order, it specifically stated that the District Court "dealt not only with the issue of whether the SSDs [suburban school districts] were constitutional violators but also whether there were significant interdistrict segregative effects. . . . When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of *Milliken* had not been met." *Jenkins* v. *Missouri,* 807 F. 2d, at 672. This holding is unambiguous. Neither the legal responsibility for nor the causal effects of KCMSD's racial segregation transgressed its boundaries, and absent such interdistrict violation or segregative effects, *Milliken* and *Gautreaux* do not permit a regional remedial plan.

JUSTICE SOUTER, however, would introduce a different level of ambiguity, arguing that the District Court took a limited view of what effects are segregative: "[W]hile white flight would have produced significant effects in other school districts, in the form of greatly increased numbers of white students, those effects would not have been segregative beyond the KCMSD, as the departing students were absorbed into wholly unitary systems." *Post,* at 164. Even if accurate, this characterization of the District Court's findings would be of little significance as to its authority to order interdistrict relief. Such remedy is appropriate only "to eliminate the interdistrict segregation directly caused by the constitutional violation," *Milliken I, supra,* at 745. Whatever effects KCMSD's constitutional violation may be ventured to have had on the surrounding districts, those effects would justify interdistrict relief only if they were "segregative beyond the KCMSD."

School desegregation remedies are intended, "as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I,* 418 U. S., at 746. In the paradigmatic case of an interdistrict violation, where district boundaries are drawn on the basis of race, a regional remedy is appropriate to ensure integration across district lines. So, too, where surrounding districts contribute to the constitutional violation by affirmative acts intended to segregate the races—*e. g.*, where those districts "arrang[e] for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties," *id.*, at 746–747. *Milliken I* of course permits interdistrict remedies in these instances of interdistrict violations. Beyond that, interdistrict remedies are also proper where "there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Id.*, at 745. Such segregative effect may be present where a predominantly black district accepts black children from adjacent districts, see *id.*, at 750, or perhaps even where the fact of intradistrict segregation actually causes whites to flee the district, cf. *Gautreaux*, 425 U. S., at 295, n. 11, for example, to avoid discriminatorily underfunded schools—and such actions produce regional segregation along district lines. In those cases, where a purely intradistrict violation has caused a significant interdistrict segregative effect, certain interdistrict remedies may be appropriate. Where, however, the segregative effects of a district's constitutional violation are contained within that district's boundaries, there is no justification for a remedy that is interdistrict in nature and scope.

Here, where the District Court found that KCMSD students attended schools separated by their race and that facilities have "literally rotted," *Jenkins* v. *Missouri*, 672 F. Supp. 400, 411 (WD Mo. 1987), it of course should order restorations and remedies that would place previously segregated black KCMSD students at par with their white KCMSD counterparts. The District Court went further, however, and ordered certain improvements to KCMSD as a whole, including schools that were not previously segregated; these district-wide remedies may also be justified (the State does not argue the point here) in light of the finding that segregation caused "a system wide *reduction* in student achievement in the schools of the KCMSD," *Jenkins* v. *Missouri*, 639 F. Supp. 19, 24 (WD Mo. 1985). Such remedies obviously may benefit some who did not suffer under—and, indeed, may have even profited from—past segregation. There is no categorical constitutional prohibition on nonvictims enjoying the collateral, incidental benefits of a remedial plan designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I,* 418 U. S., at 746. Thus, if restoring KCMSD to unitary status would attract whites into the school district, such a reversal of the white exodus would be of no legal consequence.

What the District Court did in this case, however, and how it transgressed the constitutional bounds of its remedial powers, was to make desegregative attractiveness the underlying goal of its remedy for the specific purpose of reversing the trend of white flight. However troubling that trend may be, remedying it is within the District Court's authority only if it is "directly caused by the constitutional violation." *Id.,* at 745. The Court and the dissent attempt to reconcile the different statements by the lower courts as to whether white flight was caused by segregation or desegregation. See *ante,* at 94–96; *post,* at 161–164. One fact, however, is uncontroverted. When the District Court found that KCMSD was racially segregated, the constitutional violation from which all remedies flow in this case, it also found that there was neither an interdistrict violation nor significant interdistrict segregative effects. See *Jenkins* v. *Missouri,* 807 F. 2d, at 672; *ante,* at 96. Whether the white exodus that has resulted in a school district that is 68% black was caused by the District Court's remedial orders or by natural, if unfortunate, demographic forces, we have it directly from the District Court that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries. In light of that finding, the District Court cannot order remedies seeking to rectify regional demographic trends that go beyond the nature and scope of the constitutional violation.

This case, like other school desegregation litigation, is concerned with "the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S., at 22. Those myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice, see, *e. g.*, *Wisconsin* v. *Mitchell*, 508 U. S. 476, 487–488 (1993); *Jones* v. *Alfred H. Mayer Co*, 392 U. S. 409, 443–444 (1968); *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326 (1966). It is true that where such legislative efforts classify persons on the basis of their race, we have mandated strict judicial scrutiny to ensure that the personal right to equal protection of the laws has not been infringed. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–494 (1989) (plurality opinion). But it is not true that strict scrutiny is "strict in theory, but fatal in fact," *Fullilove* v. *Klutznick*, 448 U. S. 448, 519 (1980) (Marshall, J., concurring in judgment); cf. *post*, at 121 (THOMAS, J., concurring). It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination.

Courts, however, are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation. Thus, even though the Civil War Amendments altered the balance of authority between federal and state *legislatures*, see *Ex parte Virginia*, 100 U. S. 339, 345 (1880), JUSTICE THOMAS cogently observes that "what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers." *Post,* at 132. Unlike Congress, which enjoys "'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" *Croson, supra,* at 490 (quoting *Katzenbach* v. *Morgan, supra,* at 651), federal courts have no comparable license and must always observe their limited judicial role. Indeed, in the school desegregation context, federal courts are specifically admonished to "take into account the interests of state and local authorities in managing their own affairs," *Milliken* v. *Bradley,* 433 U. S. 267, 281 (1977) *(Milliken II),* in light of the intrusion into the area of education, "where States historically have been sovereign," *United States* v. *Lopez,* 514 U. S. 549, 564 (1995), and "to which States lay claim by right of history and expertise," *id.,* at 583 (KENNEDY, J., concurring).

In this case, it may be the "myriad factors of human existence," *Swann, supra,* at 22, that have prompted the white exodus from KCMSD, and the District Court cannot justify its transgression of the above constitutional principles simply by invoking desegregative attractiveness. The Court today discusses desegregative attractiveness only insofar as it supports the salary increase order under review, see *ante,* at 84, 89–90, and properly refrains from addressing the propriety of all the remedies that the District Court has ordered, revised, and extended in the 18-year history of this case. These remedies may also be improper to the extent that they serve the same goals of desegregative attractiveness and suburban comparability that we hold today to be impermissible, and, conversely, the District Court may be able to justify some remedies without reliance on these goals. But these are questions that the Court rightly leaves to be answered on remand. For now, it is enough to affirm the principle that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken II, supra,* at 280.

For these reasons, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. Instead of focusing on remedying the harm done to those black schoolchildren injured by segregation, the District Court here sought to convert the Kansas City, Missouri, School District (KCMSD) into a "magnet district" that would reverse the "white flight" caused by *de*segregation. In this respect, I join the Court's decision concerning the two remedial issues presented for review. I write separately, however, to add a few thoughts with respect to the overall course of this litigation. In order to evaluate the scope of the remedy, we must understand the scope of the constitutional violation and the nature of the remedial powers of the federal courts.

Two threads in our jurisprudence have produced this unfortunate situation, in which a District Court has taken it upon itself to experiment with the education of the KCMSD's black youth. First, the court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority. Second, we have permitted the federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation. The exercise of this authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm.

I

A

The mere fact that a school is black does not mean that it is the product of a constitutional violation. A "racial imbalance does not itself establish a violation of the Constitution." *United States* v. *Fordice*, 505 U. S. 717, 745 (1992) (THOMAS, J., concurring). Instead, in order to find unconstitutional segregation, we require that plaintiffs "prove all of the essential elements of *de jure* segregation—that is, stated simply, a current condition of segregation resulting from *intentional state action directed specifically* to the [allegedly segregated] schools." *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 205–206 (1973) (emphasis added). "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.*, at 208 (emphasis in original).

In the present case, the District Court inferred a continuing constitutional violation from two primary facts: the existence of *de jure* segregation in the KCMSD prior to 1954, and the existence of *de facto* segregation today. The District Court found that in 1954, the KCMSD operated 16 segregated schools for black students, and that in 1974 39 schools in the district were more than 90% black. Desegregation efforts reduced this figure somewhat, but the District Court stressed that 24 schools remained "racially isolated," that is, more than 90% black, in 1983–1984. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1492–1493 (WD Mo. 1984). For the District Court, it followed that the KCMSD had not dismantled the dual system entirely. *Id.*, at 1493. The District Court also concluded that because of the KCMSD's failure to "become integrated on a system-wide basis," the dual system still exerted "lingering effects" upon KCMSD black students, whose "general attitude of inferiority" produced "low achievement . . . which ultimately limits employment opportunities and causes poverty." *Id.*, at 1492.

Without more, the District Court's findings could not have supported a finding of liability against the State. It should by now be clear that the existence of one-race schools is not by itself an indication that the State is practicing segregation. See, *e. g., Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 26 (1971); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 435–437 (1976); *Freeman* v. *Pitts*, 503 U. S. 467, 493–494 (1992). The continuing "racial isolation" of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions. Here, for instance, the demography of the entire KCMSD has changed considerably since 1954. Though blacks accounted for only 18.9% of KCMSD's enrollment in 1954, by 1983–1984 the school district was 67.7% black. 593 F. Supp., at 1492, 1495. That certain schools are overwhelmingly black in a district that is now more than two-thirds black is hardly a sure sign of intentional state action.

In search of intentional state action, the District Court linked the State and the dual school system of 1984 in two ways. First, the court found that "[i]n the past" the State had placed its "imprimatur on racial discrimination." As the court explained, laws from the Jim Crow era created "an atmosphere in which . . . private white individuals could justify their bias and prejudice against blacks," with the possible result that private realtors, bankers, and insurers engaged in more discriminatory activities than would otherwise have occurred. *Id.*, at 1503. But the District Court itself acknowledged that the State's alleged encouragement of private discrimination was a fairly tenuous basis for finding liability. *Ibid.* The District Court therefore rested the State's liability on the simple fact that the State had intentionally created the dual school system before 1954, and had failed to fulfill "its affirmative duty of disestablishing a dual school system subsequent to 1954." *Id.*, at 1504. According to the District Court, the schools whose student bodies were more than 90% black constituted "vestiges" of the prior *de jure* segregation, which the State and the KCMSD had an obligation to eliminate. *Id.*, at 1504, 1506. Later, in the course of issuing its first "remedial" order, the District Court added that a "system wide reduction in student achievement in the schools of . . . KCMSD" was also a vestige of the prior *de jure* segregation. *Jenkins* v. *Missouri*, 639 F. Supp. 19, 24 (WD Mo. 1985) (emphasis deleted).[1] In a subsequent order, the District Court indicated that post-1954 "white flight" was another vestige of the pre-1954 segregated system. 1 App. 126.

In order for a "vestige" to supply the ground for an exercise of remedial authority, it must be clearly traceable to the dual school system. The "vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied." *Freeman* v. *Pitts*, 503 U. S., at 496. District courts must not confuse the consequences of *de jure* segregation with the results of larger social forces or of private decisions. "It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation." *Ibid.*; accord, *id.*, at 501 (SCALIA, J., concurring); *Columbus Bd. of Ed.* v. *Penick*, 443 U. S. 449, 512 (1979) (REHNQUIST, J., dissenting); *Pasadena City Bd. of Ed.* v. *Spangler*, *supra*, at 435–436. As state-enforced segregation recedes further into the past, it is more likely that "these kinds of continuous and massive demographic shifts," *Freeman*, 503 U. S., at 495, will be the real source of racial imbalance or of poor educational performance in a school district. And as we have emphasized, "[i]t is beyond the authority and beyond the practical ability of the federal courts to try to counteract" these social changes. *Ibid.*

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[1] It appears that the low achievement levels were never properly attributed to any discriminatory actions on the part of the State or of KCMSD. The District Court simply found that the KCMSD's test scores were below national norms in reading and mathematics. 639 F. Supp., at 25. Without more, these statistics are meaningless.

When a district court holds the State liable for discrimination almost 30 years after the last official state action, it must do more than show that there are schools with high black populations or low test scores. Here, the District Judge did not make clear how the high black enrollments in certain schools were fairly traceable to the State of Missouri's actions. I do not doubt that Missouri maintained the despicable system of segregation until 1954. But I question the District Court's conclusion that because the State had enforced segregation until 1954, its actions, or lack thereof, proximately caused the "racial isolation" of the predominantly black schools in 1984. In fact, where, as here, the finding of liability comes so late in the day, I would think it incumbent upon the District Court to explain how more recent social or demographic phenomena did not cause the "vestiges." This the District Court did not do.

B

Without a basis in any real finding of intentional government action, the District Court's imposition of liability upon the State of Missouri improperly rests upon a theory that racial imbalances are unconstitutional. That is, the court has "indulged the presumption, often irrebuttable in practice, that a presently observed [racial] imbalance has been proximately caused by intentional state action during the prior *de jure* era." *United States* v. *Fordice,* 505 U. S., at 745 (THOMAS, J., concurring) (citing *Dayton Bd. of Ed.* v. *Brinkman,* 443 U. S. 526, 537 (1979), and *Keyes* v. *School Dist. No. 1,* 413 U. S., at 211). In effect, the court found that racial imbalances constituted an ongoing constitutional violation that continued to inflict harm on black students.

This position appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.

The District Court's willingness to adopt such stereotypes stemmed from a misreading of our earliest school desegregation case. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*, the Court noted several psychological and sociological studies purporting to show that *de jure* segregation harmed black students by generating "a feeling of inferiority" in them. Seizing upon this passage in *Brown I*, the District Court asserted that "forced segregation ruins attitudes and is inherently unequal." 593 F. Supp., at 1492. The District Court suggested that this inequality continues in full force even after the end of *de jure* segregation:

> "The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty. While it may be true that poverty results in low achievement regardless of race, it is undeniable that most poverty-level families are black. The District stipulated that as of 1977 they had not eliminated all the vestiges of the prior dual system. The Court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the [KCMSD]." *Ibid.* (citations omitted).

Thus, the District Court seemed to believe that black students in the KCMSD would continue to receive an "inferior education" despite the end of *de jure* segregation, as long as *de facto* segregation persisted. As the District Court later concluded, compensatory educational programs were necessary "as a means of remedying many of the educational problems which go hand in hand with racially isolated minority student populations." 639 F. Supp., at 25. Such assumptions and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle.[2]

It is clear that the District Court misunderstood the meaning of *Brown I*. *Brown I* did not say that "racially isolated" schools were inherently inferior; the harm that it identified was tied purely to *de jure* segregation, not *de facto* segregation. Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. See McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995). As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I, supra*, at 495. At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, see *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944)) has proven automatically fatal.

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[2] The studies cited in *Brown I* have received harsh criticism. See, *e. g.*, Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 Law & Contemp. Prob. 57, 70 (Autumn 1978); L. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools 27–28 (1976). Moreover, there simply is no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had. See, *e. g.*, Bradley & Bradley, The Academic Achievement of Black Students in Desegregated Schools, 47 Rev. Educational Research 399 (1977); N. St. John, School Desegregation: Outcomes for Children (1975); Epps, The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality, 39 Law & Contemp. Prob. 300 (Spring 1975). Contra, Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42 Law & Contemp. Prob. 17 (Summer 1978); Crain & Mahard, The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis, 88 Am. J. of Sociology 839 (1983). Although the gap between black and white test scores has narrowed over the past two decades, it appears that this has resulted more from gains in the socioeconomic status of black families than from desegregation. See Armor, Why is Black Educational Achievement Rising?, 108 The Public Interest 65, 77–79 (Summer 1992).

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.

Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race. Of course, segregation additionally harmed black students by relegating them to schools with substandard facilities and resources. But neutral policies, such as local school assignments, do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations. See *Keyes* v. *School Dist. No. 1*, 413 U. S., at 211. The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.

Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools. Despite their origins in "the shameful history of state-enforced segregation," these institutions can be "'both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of . . . learning for their children.'" *Fordice*, 505 U. S., at 748 (THOMAS, J., concurring) (citation omitted). Because of their "distinctive histories and traditions," *ibid.*, black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.

Thus, even if the District Court had been on firmer ground in identifying a link between the KCMSD's pre-1954 *de jure* segregation and the present "racial isolation" of some of the district's schools, mere *de facto* segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of *de jure* segregation. "Racial isolation" itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.

This misconception has drawn the courts away from the important goal in desegregation. The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color. The lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.

II

We have authorized the district courts to remedy past *de jure* segregation by reassigning students in order to eliminate or decrease observed racial imbalances, even if present methods of pupil assignment are facially neutral. See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971); *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430 (1968). The District Court here merely took this approach to its logical next step. If racial proportions are the goal, then schools must improve their facilities to attract white students until the district's racial balance is restored to the "right" proportions. Thus, fault for the problem we correct today lies not only with a twisted theory of racial injuries, but also with our approach to the remedies necessary to correct racial imbalances.

The District Court's unwarranted focus on the psychological harm to blacks and on racial imbalances has been only half of the tale. Not only did the court subscribe to a theory of injury that was predicated on black inferiority, it also married this concept of liability to our expansive approach to remedial powers. We have given the federal courts the freedom to use any measure necessary to reverse problems—such as racial isolation or low educational achievement—that have proven stubbornly resistant to government policies. We have not permitted constitutional principles such as federalism or the separation of powers to stand in the way of our drive to reform the schools. Thus, the District Court here ordered massive expenditures by local and state authorities, without congressional or executive authorization and without any indication that such measures would attract whites back to KCMSD or raise KCMSD test scores. The time has come for us to put the genie back in the bottle.

A

The Constitution extends "[t]he judicial Power of the United States" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." Art. III, §§1, 2. I assume for purposes of this case that the remedial authority of the federal courts is inherent in the "judicial Power," as there is no general equitable remedial power expressly granted by the Constitution or by statute. As with any inherent judicial power, however, we ought to be reluctant to approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 63–76 (1991) (KENNEDY, J., dissenting); *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 815–825 (1987) (SCALIA, J., concurring in judgment).

Motivated by our worthy desire to eradicate segregation, however, we have disregarded this principle and given the courts unprecedented authority to shape a remedy in equity. Although at times we have invalidated a decree as beyond the bounds of an equitable remedy, see *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)*, these instances have been far outnumbered by the expansions in the equity power. In *United States* v. *Montgomery County Bd. of Ed.*, 395 U. S. 225 (1969), for example, we allowed federal courts to desegregate faculty and staff according to specific mathematical ratios, with the ultimate goal that each school in the system would have roughly the same proportions of white and black faculty. In *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, we permitted federal courts to order busing, to set racial targets for school populations, and to alter attendance zones. And in *Milliken* v. *Bradley*, 433 U. S. 267 (1977) *(Milliken II)*, we approved the use of remedial or compensatory education programs paid for by the State.

In upholding these court-ordered measures, we indicated that trial judges had virtually boundless discretion in crafting remedies once they had identified a constitutional violation. As *Swann* put it, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U. S., at 15. We did say that "the nature of the violation determines the scope of the remedy," *id.*, at 16, but our very next sentence signaled how weak that limitation was: "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system," *ibid.*

It is perhaps understandable that we permitted the lower courts to exercise such sweeping powers. Although we had authorized the federal courts to work toward "a system of determining admission to the public schools on a nonracial basis" in *Brown* v. *Board of Education,* 349 U. S. 294, 300–301 (1955) *(Brown II),* resistance to *Brown I* produced little desegregation by the time we decided *Green* v. *School Bd. of New Kent Cty., supra.* Our impatience with the pace of desegregation and with the lack of a good-faith effort on the part of school boards led us to approve such extraordinary remedial measures. But such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution. The judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary remedies in the past.

Our prior decision in this litigation suggested that we would approve the continued use of these expansive powers even when the need for their exercise had disappeared. In *Missouri* v. *Jenkins,* 495 U. S. 33 (1990) *(Jenkins II),* the District Court in this litigation had ordered an increase in local property taxes in order to fund its capital improvements plan. KCMSD, which had been ordered by the Court to finance 25% of the plan, could not pay its share due to state constitutional and statutory provisions placing a cap on property taxes. *Id.*, at 38, 41. Although we held that principles of comity barred the District Court from imposing the tax increase itself (except as a last resort), we also concluded that the court could order KCMSD to raise taxes, and could enjoin the state laws preventing KCMSD from doing so. With little analysis, we held that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." *Id.*, at 55.

Our willingness to unleash the federal equitable power has reached areas beyond school desegregation. Federal courts have used "structural injunctions," as they are known, not only to supervise our Nation's schools, but also to manage prisons, see *Hutto* v. *Finney*, 437 U. S. 678 (1978), mental hospitals, *Thomas S.* v. *Flaherty*, 902 F. 2d 250 (CA4), cert. denied, 498 U. S. 951 (1990), and public housing, *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). See generally D. Horowitz, The Courts and Social Policy 4–9 (1977). Judges have directed or managed the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on their authority.

B

Such extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers' design. The available historical records suggest that the Framers did not intend federal equitable remedies to reach as broadly as we have permitted. Anticipating the growth of our modern doctrine, the Anti-Federalists criticized the Constitution because it might be read to grant broad equitable powers to the federal courts. In response, the defenders of the Constitution "sold" the new framework of government to the public by espousing a narrower interpretation of the equity power. When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response. See *McIntyre* v. *Ohio*

Elections Comm'n, 514 U. S. 334, 367 (1995) (THOMAS, J., concurring in judgment).

The rise of the English equity courts as an alternative to the rigors of the common law, and the battle between the courts of equity and the courts of common law, is by now a familiar tale. See T. Plucknett, A Concise History of the Common Law 191–198, 673–694 (5th ed. 1956). By the middle of the 18th century, equity had developed into a precise legal system encompassing certain recognized categories of cases, such as those involving special property forms (trusts) or those in which the common law did not provide relief (fraud, forgery, or mistake). See 5 W. Holdsworth, History of English Law 300–338 (1927); S. Milsom, Historical Foundations of the Common Law 85–87 (1969); J. Baker, An Introduction to English Legal History 93–95 (2d ed. 1979). In this fixed system, each of these specific actions then called for a specific equitable remedy.

Blackstone described the principal differences between courts of law and courts of equity as lying only in the "modes of administering justice,"—"in the mode of proof, the mode of trial, and the mode of relief." 3 W. Blackstone, Commentaries on the Laws of England 436 (1768). As to the last, the English jurist noted that courts of equity held a concurrent jurisdiction when there is a "want of a more specific remedy, than can be obtained in the courts of law." *Id.,* at 438. Throughout his discussion, Blackstone emphasized that courts of equity must be governed by rules and precedents no less than the courts of law. "[I]f a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible." *Id.,* at 440. If their remedial discretion had not been cabined, Blackstone warned, equity courts would have undermined the rule of law and produced arbitrary government. "[The judiciary's] powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will." *Ibid.* (footnote omitted); see also 1 *id.*, at 61–62.[3]

So cautioned, the Framers approached equity with suspicion. As Thomas Jefferson put it: "Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it's equity, and the whole legal system becomes incertain." 9 Papers of Thomas Jefferson 71 (J. Boyd ed. 1954). Suspicion of judicial discretion led to criticism of Article III during the ratification of the Constitution. Anti-Federalists attacked the Constitution's extension of the federal judicial power to "Cases, in Law and Equity," arising under the Constitution and federal statutes. According to the Anti-Federalists, the reference to equity granted federal judges excessive discretion to deviate from the requirements of the law. Said the "Federal Farmer," "by thus joining the word equity with the word law, if we mean any thing, we seem to mean to give the judge a discretionary power." Federal Farmer No. 15, Jan. 18, 1788, in 2 The Complete Anti-Federalist 322 (H. Storing ed. 1981) (hereinafter Storing). He hoped that the Constitution's mention of equity jurisdiction was not "intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate." *Id.*, at 322–323.[4] Another Anti-Federalist, Brutus, argued that the equity power would allow federal courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Brutus No. 11, Jan. 31, 1788, *id.*, at 419. This, predicted Brutus, would result in the growth of federal power and the "entire subversion of the legislative, executive and judicial powers of the individual states." *Id.*, at 420. See G. McDowell, Equity and the Constitution 43–44 (1982).

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[3] As Blackstone wrote: "[A] set of great and eminent lawyers . . . have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law." 3 Blackstone, at 440–441.

[4] The Federal Farmer particularly feared the combination of equity and law in the same federal courts: "It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in

These criticisms provoked a Federalist response that explained the meaning of Article III's words. Answering the Anti-Federalist challenge in The Federalist Papers, Alexander Hamilton described the narrow role that the federal judicial power would play. Initially, Hamilton conceded that the federal courts would have some freedom in interpreting the laws and that federal judges would have lifetime tenure. The Federalist No. 78, p. 528 (J. Cooke ed. 1961). Nonetheless, Hamilton argued (as Blackstone had in describing the English equity courts) that rules and established practices would limit and control the judicial power: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Id.*, at 529. Cf. 1 J. Story, Commentaries on Equity Jurisprudence §§ 18–20, pp. 15–17 (I. Redfield 9th ed. 1866). Hamilton emphasized that "[t]he great and primary use of a court of equity is to give relief *in extraordinary cases,*" and that "the principles by which that relief is governed are now reduced to a regular system." The Federalist No. 83, at 569, and n.

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equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." Federal Farmer No. 3, Oct. 10, 1787, in 2 Storing 244. In such a system, the Anti-Federalist writer concluded, there would not be "a spark of freedom" to be found. *Ibid.*

In response to Anti-Federalist concerns that equity would permit federal judges an unchecked discretion, Hamilton explicitly relied upon the precise nature of the equity system that prevailed in England and had been transplanted in America. Equity jurisdiction was necessary, Hamilton argued, because litigation "between individuals" often would contain claims of "*fraud, accident, trust* or *hardship,* which would render the matter an object of equitable, rather than of legal jurisdiction." *Id.,* No. 80, at 539. "In such cases," Hamilton concluded, "where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction." *Id.,* at 540. Thus, Hamilton sought to narrow the expansive Anti-Federalist reading of inherent judicial equity power by demonstrating that the defined nature of the English and colonial equity system—with its specified claims and remedies—would continue to exist under the federal judiciary. In line with the prevailing understanding of equity at the time, Hamilton described Article III "equity" as a jurisdiction over certain types of cases rather than as a broad remedial power. Hamilton merely repeated the well-known principle that equity would be controlled no less by rules and practices than was the common law.

In light of this historical evidence, it should come as no surprise that there is no early record of the exercise of broad remedial powers. Certainly there were no "structural injunctions" issued by the federal courts, nor were there any examples of continuing judicial supervision and management of governmental institutions. Such exercises of judicial power would have appeared to violate principles of state sovereignty and of the separation of powers as late in the day as the turn of the century. "Born out of the desegregation litigation in the 1950's and 1960's, suits for affirmative injunctions were virtually unknown when the Court decided *Ex parte Young,* [209 U. S. 123, 158 (1908)]." Dwyer, Pendent Jurisdiction and the Eleventh Amendment, 75 Calif. L. Rev.

129, 162 (1987) (footnotes omitted). Indeed, it appears that the Framers continued to follow English equity practice well after the Ratification. See, *e. g., Robinson* v. *Campbell,* 3 Wheat. 212, 221–223 (1818). At the very least, given the Federalists' public explanation during the ratification of the federal equity power, we should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use.

C

Two clear restraints on the use of the equity power—federalism and the separation of powers—derive from the very form of our Government. Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States. We have long recognized that education is primarily a concern of local authorities. "[L]ocal autonomy of school districts is a vital national tradition." *Dayton Bd. of Ed.* v. *Brinkman,* 433 U. S. 406, 410 (1977); see also *United States* v. *Lopez,* 514 U. S. 549, 580 (1995) (KENNEDY, J., concurring); *Milliken I,* 418 U. S., at 741–742; *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 50 (1973); *ante,* at 113 (O'CONNOR, J., concurring). A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds to the desegregation plan at the expense of other citizens, other government programs, and other institutions not represented in court. See Dwyer, *supra,* at 163. When district courts seize complete control over the schools, they strip state and local governments of one of their most important governmental responsibilities, and thus deny their existence as independent governmental entities.

Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution. See *Wright* v. *Council of Emporia*, 407 U. S. 451, 477–478 (1972) (Burger, C. J., dissenting).[5] Federal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies. See generally P. Schuck, Suing Government 150–181 (1983). When we presume to have the institutional ability to set effective educational, budgetary, or administrative policy, we transform the least dangerous branch into the most dangerous one.

The separation of powers imposes additional restraints on the judiciary's exercise of its remedial powers. To be sure, this is not a case of one branch of Government encroaching on the prerogatives of another, but rather of the power of the Federal Government over the States. Nonetheless, what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers. There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running school systems or prisons and courts running Executive Branch agencies.

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[5] Certain aspects of this desegregation plan—for example, compensatory educational programs and orders that the State pay for half of the costs—come perilously close to abrogating the State's Eleventh Amendment immunity from federal money damages awards. See *Edelman* v. *Jordan*, 415 U. S. 651, 677 (1974) ("[A] federal court's remedial power . . . may not include a retroactive award which requires the payment of funds from the state treasury"). Although we held in *Milliken II*, 433 U. S. 267 (1977), that such remedies did not run afoul of the Eleventh Amendment, *id.*, at 290, it is difficult to see how they constitute purely prospective relief rather than retrospective compensation. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1191–1192 (3d ed. 1988). Of course, the state treasury inevitably must fund a State's compliance with injunctions commanding prospective relief, see *Edelman, supra*, at 668, but that does not require a State to supply money to comply with orders that have a backward-looking, compensatory purpose.

In this case, not only did the District Court exercise the legislative power to tax, it also engaged in budgeting, staffing, and educational decisions, in judgments about the location and esthetic quality of the schools, and in administrative oversight and monitoring. These functions involve a legislative or executive, rather than a judicial, power. See generally *Jenkins II*, 495 U. S., at 65–81 (KENNEDY, J., concurring in part and concurring in judgment); Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978). As Alexander Hamilton explained the limited authority of the federal courts: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78, at 526. Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise. Cf. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949 (1978).

It is perhaps not surprising that broad equitable powers have crept into our jurisprudence, for they vest judges with the discretion to escape the constraints and dictates of the law and legal rules. But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

D

The dissent's approval of the District Court's treatment of salary increases is typical of this Court's failure to place limits on the equitable remedial power. The dissent frames the inquiry thus: "The only issue, then, is whether the salary increases ordered by the District Court have been reasonably related to achieving" the goal of remedying a systemwide reduction in student achievement, "keeping in mind the broad discretion enjoyed by the District Court in exercising its equitable powers." *Post,* at 155. In response to its question, the dissent concludes that "it is difficult to see how the District Court abused its discretion" in either the 1992 or 1993 orders, *ibid.*, and characterizes the lower court's orders as "beyond reproach," *post,* at 158. When the standard of review is as vague as whether "federal-court decrees . . . directly address and relate to the constitutional violation," *Milliken II,* 433 U. S., at 281–282, it is difficult to ever find a remedial order "unreasonable." Such criteria provide district courts with little guidance, and provide appellate courts few principles with which to review trial court decisions. If the standard reduces to what one believes is a "fair" remedy, or what vaguely appears to be a good "fit" between violation and remedy, then there is little hope of imposing the constraints on the equity power that the Framers envisioned and that our constitutional system requires.

Contrary to the dissent's conclusion, the District Court's remedial orders are in tension with two commonsense principles. First, the District Court retained jurisdiction over the implementation and modification of the remedial decree, instead of terminating its involvement after issuing its remedy. Although briefly mentioned in *Brown II* as a temporary measure to overcome local resistance to desegregation, 349 U. S., at 301 ("During this period of transition, the courts will retain jurisdiction"), this concept of continuing judicial involvement has permitted the District Courts to revise their remedies constantly in order to reach some broad, abstract, and often elusive goal. Not only does this approach deprive the parties of finality and a clear understanding of their responsibilities, but it also tends to inject the judiciary into the day-to-day management of institutions and local policies—a function that lies outside of our Article III competence. Cf. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).

Much of the District Court's overreaching in this case occurred because it employed this hit-or-miss method to shape, and reshape, its remedial decree.[6] Using its authority of continuing jurisdiction, the court pursued its goal of decreasing "racial isolation" regardless of the cost or of the difficulties of engineering demographic changes. Wherever possible, district courts should focus their remedial discretion on devising and implementing a unified remedy in a single decree. This method would still provide the lower courts with substantial flexibility to tailor a remedy to fit a violation, and courts could employ their contempt power to ensure compliance. To ensure that they do not overstep the boundaries of their Article III powers, however, district courts should refrain from exercising their authority in a manner that supplants the proper sphere reserved to the political branches, who have a coordinate duty to enforce the Constitution's dictates, and to the States, whose authority over schools we have long sought to preserve. Only by remaining aware of the limited nature of its remedial powers, and by giving the respect due to other governmental authorities, can the judiciary ensure that its desire to do good will not tempt it into abandoning its limited role in our constitutional Government.

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[6] First, the District Court set out to achieve some unspecified levels of racial balance in the KCMSD schools and to raise the test scores of the school districts as a whole. 639 F. Supp. 19, 24, 38 (WD Mo. 1985). In order to achieve that goal, the court ordered quality education programs to address the "system wide reduction in student achievement" caused by segregation, even though the court never specified how or to what extent the dual system had actually done so. *Id.*, at 46–51. After the State had spent $220 million and KCMSD had achieved a AAA rating, see *ante*, at 75–76, the District Court decided that even further measures were needed. In 1986, it ordered a massive magnet school and capital improvement plan to attract whites into KCMSD. 1 App. 130–193. In 1987, the District Court decided that KCMSD needed better instructional staff and ordered salary assistance for teachers. *Ante*, at 78. In 1992, the District Court found that KCMSD was having trouble attracting faculty and staff, and ordered a round of salary increases for virtually all employees. *Ante*, at 80. Every year the District Court holds a proceeding to review budget proposals and educational policies for KCMSD, and it has formed a "desegregation monitoring committee" to assess the implementation of its decrees. One need only review the District Court's first remedial order in 1984 to comprehend the level of detail with which it has made decisions concerning construction, facilities, staffing, and educational policy. 639 F. Supp. 19; see also *Missouri* v. *Jenkins*, 495 U. S. 33, 60–61 (1990) (KENNEDY, J., concurring in part and concurring in judgment).

Second, the District Court failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims of segregation. Of course, the initial and most important aspect of any remedy will be to eliminate any invidious racial distinctions in matters such as student assignments, transportation, staff, resource allocation, and activities. This element of most desegregation decrees is fairly straightforward and has not produced many examples of overreaching by the district courts. It is the "compensatory" ingredient in many desegregation plans that has produced many of the difficulties in the case before us.

Having found that segregation "has caused a system wide reduction in student achievement in the schools of the KCMSD," 639 F. Supp., at 24, the District Court ordered the series of magnet school plans, educational programs, and capital improvements that the Court criticizes today because of their interdistrict nature. In ordering these programs, the District Court exceeded its authority by benefiting those who were not victims of discriminatory conduct. KCMSD as a whole may have experienced reduced achievement levels, but raising the test scores of the *entire* district is a goal that is not sufficiently tailored to restoring the *victims* of segregation to the position they would have occupied absent discrimination. A school district cannot be discriminated against on the basis of its race, because a school district has no race. It goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy.

Of course, a district court may see fit to order necessary remedies that have the side effect of benefiting those who were not victims of segregation. But the court cannot order broad remedies that indiscriminately benefit a school district as a whole, rather than the individual students who suffered from discrimination. Not only do such remedies tend to indicate "efforts to achieve broader purposes lying beyond" the scope of the violation, *Swann,* 402 U. S., at 22, but they also force state and local governments to work toward the benefit of those who have suffered no harm from their actions.

To ensure that district courts do not embark on such broad initiatives in the future, we should demand that remedial decrees be more precisely designed to benefit only those who have been victims of segregation. Race-conscious remedies for discrimination not only must serve a compelling governmental interest (which is met in desegregation cases), but also must be narrowly tailored to further that interest. See *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 509–510 (1989) (plurality opinion). In the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or were even alive) during the period of segregation. Although I do not doubt that all KCMSD students benefit from many of the initiatives ordered by the court below, it is for the democratically accountable state and local officials to decide whether they are to be made available even to those who were never harmed by segregation.

III

This Court should never approve a State's efforts to deny students, because of their race, an equal opportunity for an education. But the federal courts also should avoid using racial equality as a pretext for solving social problems that do not violate the Constitution. It seems apparent to me that the District Court undertook the worthy task of providing a quality education to the children of KCMSD. As far as I can tell, however, the District Court sought to bring new funds and facilities into the KCMSD by finding a constitutional violation on the part of the State where there was none. Federal courts should not lightly assume that States have caused "racial isolation" in 1984 by maintaining a segregated school system in 1954. We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior.

Even if segregation were present, we must remember that a deserving end does not justify all possible means. The desire to reform a school district, or any other institution, cannot so captivate the judiciary that it forgets its constitutionally mandated role. Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court's process of orderly adjudication has broken down in this case. The Court disposes of challenges to only two of the District Court's many discrete remedial orders by declaring that the District Court erroneously provided an interdistrict remedy for an intradistrict violation. In doing so, it resolves a foundational issue going to one element of the District Court's decree that we did not accept for review in this case, that we need not reach in order to answer the questions that we did accept for review, and that we specifically refused to consider when it was presented in a prior petition for certiorari. Since, under these circumstances, the respondent school district and pupils naturally came to this Court without expecting that a fundamental premise of a portion of the District Court's remedial order would become the focus of the case, the essence of the Court's misjudgment in reviewing and repudiating that central premise lies in its failure to have warned the respondents of what was really at stake. This failure lulled the respondents into addressing the case without sufficient attention to the foundational issue, and their lack of attention has now infected the Court's decision.

No one on the Court has had the benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling. The deficiencies from which we suffer have led the Court effectively to overrule a unanimous constitutional precedent of 20 years' standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way.

The Court's departures from the practices that produce informed adjudication would call for dissent even in a simple case. But in this one, with a trial history of more than 10 years of litigation, the Court's failure to provide adequate notice of the issue to be decided (or to limit the decision to issues on which certiorari was clearly granted) rules out any confidence that today's result is sound, either in fact or in law.

I

In 1984, 30 years after our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the District Court found that the State of Missouri and the Kansas City, Missouri, School District (KCMSD) had failed to reform the segregated scheme of public school education in the KCMSD, previously mandated by the State, which had required black and white children to be taught separately according to race. *Jenkins*

v. *Missouri*, 593 F. Supp. 1485, 1490–1494, 1503–1505 (WD Mo. 1984).[1] After *Brown*, neither the State nor the KCMSD moved to dismantle this system of separate education "root and branch," *id.*, at 1505, despite their affirmative obligation to do that under the Constitution. *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 437–438 (1968). "Instead, the [KCMSD] chose to operate some completely segregated schools and some integrated ones," *Jenkins*, 593 F. Supp., at 1492, using devices like optional attendance zones and liberal transfer policies to "allo[w] attendance patterns to continue on a segregated basis." *Id.*, at 1494. Consequently, on the 20th anniversary of *Brown* in 1974, 39 of the 77 schools in the KCMSD had student bodies that were more than 90 percent black, and 80 percent of all black schoolchildren in the KCMSD attended those schools. 593 F. Supp., at 1492–1493. Ten years later, in the 1983–1984 school year, 24 schools remained racially isolated with more than 90 percent black enrollment. *Id.*, at 1493. Because the State and the KCMSD intentionally created this segregated system of education, and subsequently failed to correct it, the District Court concluded that the State and the district had "defaulted in their obligation to uphold the Constitution." *Id.*, at 1505.

Neither the State nor the KCMSD appealed this finding of liability, after which the District Court entered a series of remedial orders aimed at eliminating the vestiges of segregation. Since the District Court found that segregation had caused, among other things, "a system wide *reduction* in student achievement in the schools of the KCMSD," *Jenkins* v. *Missouri,* 639 F. Supp. 19, 24 (WD Mo. 1985) (emphasis in original), it ordered the adoption, starting in 1985, of a series of remedial programs to raise educational performance. As the Court recognizes, the District Court acted well within the bounds of its equitable discretion in doing so, *ante,* at 90, 101; in *Milliken* v. *Bradley,* 433 U. S. 267 (1977) *(Milliken II),* we held that a district court is authorized to remedy all conditions flowing directly from the constitutional violations committed by state or local officials, including the educational deficits that result from a segregated school system (programs aimed to correct those deficits are therefore frequently referred to as *Milliken II* programs). *Id.,* at 281–283. Nor was there any objection to the District Court's orders from the State and the KCMSD, who agreed that it was " 'appropriate to include a number of properly targeted educational programs in [the] desegregation plan,' " *Jenkins,* 639 F. Supp., at 24 (quoting from the State's desegregation proposal). They endorsed many of the initiatives directed at improving student achievement that the District Court ultimately incorporated into its decree, including those calling for the attainment of AAA status for the KCMSD (a designation, conferred by the State Department of Elementary and Secondary Education upon consideration of a limited number of criteria, indicating "that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students," *id.,* at 26), full day kindergarten, summer school, tutoring before and after school, early childhood development, and reduction in class sizes. *Id.,* at 24–26.

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[1] In related litigation about the schools of St. Louis, the Eighth Circuit has noted that "[b]efore the Civil War, Missouri prohibited the creation of schools to teach reading and writing to blacks. Act of February 16, 1847, § 1, 1847 Mo. Laws 103. State-mandated segregation was first imposed in the 1865 Constitution, Article IX § 2. It was reincorporated in the Missouri Constitution of 1945: Article IX specifically provided that separate schools were to be maintained for 'white and colored children.' In 1952, the Missouri Supreme Court upheld the constitutionality of Article IX under the United States Constitution. Article IX was not repealed until 1976." *Liddell* v. *Missouri*, 731 F. 2d 1294, 1305–1306 (CA8 1984) (case citations and footnote omitted).

Between 1985 and 1987 the District Court also ordered the implementation of a magnet school concept, 1 App. 131–133 (Order of Nov. 12, 1986), and extensive capital improvements to the schools of the KCMSD. *Jenkins* v. *Missouri,* 672

F. Supp. 400, 405–408 (WD Mo. 1987); 1 App. 133–134 (Order of Nov. 12, 1986); *Jenkins*, 639 F. Supp., at 39–41. The District Court found that magnet schools would not only serve to remedy the deficiencies in student achievement in the KCMSD, but would also assist in desegregating the district by attracting white students back into the school system. See, *e. g.*, 1 App. 118 (Order of June 16, 1986) ("[C]ommitment, when coupled with quality planning and sufficient resources can result in the establishment of magnet schools which can attract non-minority enrollment as well as be an integral part of district-wide improved student achievement"); see also *Jenkins* v. *Missouri*, 855 F. 2d 1295, 1301 (CA8 1988) ("The foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools").

The District Court, finding that the physical facilities in the KCMSD had "literally rotted," *Jenkins*, 672 F. Supp., at 411, similarly grounded its orders of capital improvements in the related remedial objects of improving student achievement and desegregating the KCMSD. *Jenkins*, 639 F. Supp., at 40 ("The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan"); see also *Jenkins*, 855 F. 2d, at 1305 ("[T]he capital improvements [are] required both to improve the education available to the victims of segregation as well as to attract whites to the schools").

As a final element of its remedy, in 1987 the District Court ordered funding for increases in teachers' salaries as a step toward raising the level of student achievement. "[I]t is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Jenkins*, 672 F. Supp., at 410. Neither the State nor the KCMSD objected to increases in teachers' salaries as an element of the comprehensive remedy, or to this cost as an item in the desegregation budget.

In 1988, however, the State went to the Eighth Circuit with a broad challenge to the District Court's remedial concept of magnet schools and to its orders of capital improvements (though it did not appeal the salary order), arguing that the District Court had run afoul of *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)*, by ordering an interdistrict remedy for an intradistrict violation. The Eighth Circuit rejected the State's position, *Jenkins*, 855 F. 2d 1295, and in 1989 the State petitioned for certiorari.

The State's petition presented two questions for review, one challenging the District Court's authority to order a property tax increase to fund its remedial program, the other going to the legitimacy of the magnet school concept at the very foundation of the Court's desegregation plan:

> "For a purely intradistrict violation, the courts below have ordered remedies—costing hundreds of millions of dollars—with the stated goals of attracting more nonminority students to the school district and making programs and facilities comparable to those in neighboring districts . . . .
>
> "The questio[n] presented [is] . . . .
>
> ". . . Whether a federal court, remedying an intradistrict violation under *Brown* v. *Board of Education*, 347 U. S. 483 (1954), may

> "a) impose a duty to attract additional non-minority students to a school district, and
>
> "b) require improvements to make the district schools comparable to those in surrounding districts." Pet. for Cert. in *Missouri* v. *Jenkins,* O. T. 1988, No. 88–1150, p. i.

We accepted the taxation question, and decided that while the District Court could not impose the tax measure itself, it could require the district to tax property at a rate adequate to fund its share of the costs of the desegregation remedy. *Missouri* v. *Jenkins,* 495 U. S. 33, 50–58 (1990). If we had accepted the State's broader, foundational question going to the magnet school concept, we could also have made an informed decision on whether that element of the District Court's remedial scheme was within the limits of the Court's equitable discretion in response to the constitutional violation found. Each party would have briefed the question fully and would have identified in some detail those items in the record bearing on it. But none of these things happened. Instead of accepting the foundational question in 1989, we denied certiorari on it. *Missouri* v. *Jenkins,* 490 U. S. 1034.

The State did not raise that question again when it returned to this Court with its 1994 petition for certiorari, which led to today's decision. Instead, the State presented, and we agreed to review, these two questions:

> "1. Whether a remedial educational desegregation program providing greater educational opportunities to victims of past de jure segregation than provided anywhere else in the country nonetheless fails to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the District, as measured by results on standardized test scores, has not risen to some unspecified level?
>
> "2. Whether a federal court order granting salary increases to virtually every employee of a school district—

> including non-instructional personnel—as a part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?" Pet. for Cert. i.

These questions focus on two discrete issues: the extent to which a district court may look at students' test scores in determining whether a school district has attained partial unitary status as to its *Milliken II* educational programs, and whether the particular salary increases ordered by the District Court constitute a permissible component of its remedy.

The State did not go beyond these discrete issues, and it framed no broader, foundational question about the validity of the District Court's magnet concept. The Court decides, however, that it can reach that question of its own initiative, and it sees no bar to this course in the provision of this Court's Rule 14.1 that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered . . . ." *Ante*, at 84–85. The broader issue, the Court claims, is "fairly included" in the State's salary question. But that claim does not survive scrutiny.

The standard under Rule 14.1 is quite simple: as the Court recognizes, we have held that an issue is fairly comprehended in a question presented when the issue must be resolved in order to answer the question. See *ibid.*, citing *Procunier* v. *Navarette*, 434 U. S. 555, 560, n. 6 (1978); *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980). That should be the end of the matter here, since the State itself concedes that we can answer its salary and test-score questions without addressing the soundness of the magnet element of the District Court's underlying remedial scheme, see Brief for Petitioners 18 ("each question [presented] can be dealt with on its own terms . . ."). While the Court ignores that concession, it is patently correct. There is no reason why we cannot take the questions as they come to us; assuming the validity of the District Court's basic remedial concept, we can determine the significance of test scores and assess the salary orders in relation to that concept.

Of course, as we understand necessity in prudential matters like this, it comes in degrees, and I would not deny that sometimes differing judgments are possible about the need to go beyond a question as originally accepted. But this is not even arguably such a case. It is instead a case that presents powerful reasons to confine discussion to the questions taken.[2]

Quite naturally, the respondents here chose not to devote any significant attention to a question not raised, and they presumably had no reason to designate for printing those portions of the record bearing on an issue not apparently before us. And while respondents seemingly gave some thought to the bare possibility that the Court would choose to deal with the discrete questions by going beyond them to a more comprehensive underlying issue, they were entitled to reject that possibility as a serious one for the very reason that the Court had already, in 1989, expressly refused to consider that foundational issue when the State expressly attempted to raise it. Our deliberate refusal to entertain so important an issue is and ought to be a reasonable basis to infer that we will not subsequently allow it to be raised on our own motion without saying so in advance and giving notice to a party whose interests might be adversely affected.

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[2] JUSTICE O'CONNOR suggests that I am saying something inconsistent with the position I took in *Bray* v. *Alexandria Women's Health Clinic,* 506 U. S. 263 (1993), see *ante,* at 105, but her claim rests on a misunderstanding of my position in that case. I did not think that in *Bray* we could reach the question whether respondents' claims fell within the "prevention clause" of 42 U. S. C. § 1985(3) simply because the question "'was briefed, albeit sparingly, by the parties prior to the first oral argument.'" *Ante,* at 105. Rather, I said that "[t]he applicability of the prevention clause is fairly included within the questions presented, especially as restated by respondents . . . ." *Bray, supra,* at 290 (SOUTER, J., concurring in judgment in part and dissenting in part). Thus the question was literally before us (as JUSTICE O'CONNOR believes the foundational question is before us under the second of the State's questions). What is not debatable is that *Bray* was not preceded by prior litigation indicating we would not consider the "prevention clause" issue, whereas this case was preceded by a refusal to take the very foundational issue that JUSTICE O'CONNOR argues is within the literal terms of the second question focusing on salaries. See *supra,* at 143–144. I obviously thought the Court was wrong to reject supplemental briefing on the prevention clause, but that rejection was a far cry from refusing to take the issue.

Thus the Court misses the point when it argues that the foundational issue is in a sense antecedent to the specific ones raised, and that those can be answered by finding error in some element of the underlying remedial scheme. Even if the Court were correct that the foundational issue could be reached under Rule 14.1, the critical question surely is whether that issue may fairly be decided without clear warning, at the culmination of a course of litigation in which this Court has specifically refused to consider the issue and given no indication of any subsequent change of mind. The answer is obviously no. And the Court's claim of necessity rings particularly hollow when one considers that if it really were essential to decide the foundational issue to address the two questions that are presented, the Court could give notice to the parties of its intention to reach the broader issue, and allow for adequate briefing and argument on it. And yet the Court does none of that, but simply decides the issue without any warning to respondents.

If there is any doubt about the lack of fairness and prudence displayed by the Court, it should disappear upon seeing two things: first, how readily the questions presented can be answered on their own terms, without giving any countenance to the State's now successful attempt to "'smuggl[e] additional questions into a case after we grant[ed] certiorari,'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. 27, 34 (1993), quoting *Irvine* v. *Cali-*

fornia, 347 U. S. 128, 129 (1954) (plurality opinion of Jackson, J.); and, second, how the Court's decision to go beyond those questions to address an issue not adequately briefed or argued by one set of parties leads it to render an opinion anchored in neither the findings and evidence contained in the record, nor in controlling precedent, which is squarely at odds with the Court's holding today.

II

A

The test-score question as it comes to us is one of word play, not substance. While the Court insists that the District Court's Order of June 17, 1992 (the only order relevant to the test-score question on review here), "requir[ed] the State to continue to fund the quality education programs because student achievement levels [in the KCMSD] were still 'at or below national norms at many grade levels' . . . ," *ante,* at 100; see also *ante,* at 73, that order contains no discussion at all of student achievement levels in the KCMSD in comparison to national norms, and in fact does not explicitly address the subject of partial unitary status. App. to Pet. for Cert. A–69 to A–75. The reference to test scores "at or below national norms" comes from an entirely different and subsequent order of the District Court (dated Apr. 16, 1993) which is not under review. Its language presumably would not have been quoted to us, if the Court of Appeals's opinion affirming the District Court's June 17, 1992, order had not canvassed subsequent orders and mentioned the District Court's finding of fact that the "KCMSD is still at or below national norms at many grade levels," 11 F. 3d 755, 762 (CA8 1994), citing Order of Apr. 16, 1993, App. to Pet. for Cert. A–130. In any event, what is important here is that none of the District Court's or Court of Appeals's opinions or orders requires a certain level of test scores before unitary status can be found, or indicates that test scores are the only thing standing between the State and a finding of unitary status as to the KCMSD's *Milliken II* programs. Indeed, the opinion concurring in the denial of rehearing en banc below (not mentioned by the Court, although it is certainly more probative of the governing law in the Eighth Circuit than the dissenting opinion on which the Court does rely) expressly disavows any dispositive role for test scores:

> "The dissent accepts, at least in part, the State's argument that the district court adopted a student achievement goal, measured by test scores, as the only basis for determining whether past discrimination has been remedied. . . . When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered. Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary." 19 F. 3d 393, 395 (1994) (Gibson, J., concurring in denial of rehearing en banc).

If, then, test scores do not explain why there was no finding of unitary status as to the *Milliken II* programs, one may ask what does explain it. The answer is quite straightforward. The Court of Appeals refused to order the District Court to enter a finding of partial unitary status as to the KCMSD's *Milliken II* programs (and apparently, the District Court did not speak to the issue itself) simply because the State did not attempt to make the showing required for that relief. As the Court recognizes, *ante*, at 88–89, we have established a clear set of procedures to be followed by governmental entities seeking the partial termination of a desegregation decree. In *Freeman* v. *Pitts*, 503 U. S. 467 (1992), we held that "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Id.*, at 485. Accordingly, before a district court may grant a school district (or other governmental entity) partial release from a desegregation decree, it must first consider "whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn . . . ." *Id.*, at 491. Full and satisfactory compliance, we emphasized in *Freeman*, is to be measured by "'whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.*, at 492, quoting *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 249–250 (1991). The district court must then consider "whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district [or other governmental entity] has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." 503 U. S., at 491. The burden of showing that these conditions to finding partial unitary status have been met rests (as one would expect) squarely on the constitutional violator who seeks relief from the existing remedial order. *Id.*, at 494.

While the Court recognizes the three-part showing that the State must make under *Freeman* in order to get a finding of partial unitary status, *ante*, at 88–89, it fails to acknowledge that the State did not even try to make a *Freeman* showing in the litigation leading up to the District Court's Order of June 17, 1992. The District Court's order was triggered not by a motion for partial unitary status filed by the State, but by a motion filed by the KCMSD for approval of its desegregation plan for the 1992–1993 school year. See App. to Pet. for Cert. A–69. While the State's response to that motion suggested that the District Court should enter a finding of partial unitary status as to the district's *Milliken II* component of its decree, State's Response to KCMSD Motion for Approval of Desegregation Plan for 1992–1993, pp. 1–20 (hereinafter State's Response), the State failed even to allege its compliance with two of the three prongs of the *Freeman* test.

The State did not claim that implementation of the *Milliken II* component of the decree had remedied the reduction in student achievement in the KCMSD to the extent practicable; it simply argued that various *Milliken II* programs had been implemented. State's Response 9–17. Accordingly, in the hearings held by the District Court on the KCMSD's motion, the State's expert witness testified only that the various *Milliken II* programs had been implemented and had increased educational opportunity in the district. 2 App. 439–483. With the exception of the "effective schools" program, he said nothing about the effects of those programs on student achievement, and in fact admitted on cross-examination that he did not have an opinion as to whether the programs had remedied to the extent practicable the reduction in student achievement caused by the segregation in the KCMSD.

> "Q: Dr. Stewart, do you, testifying on behalf of the State . . . have an opinion as to whether or not the educational deficits that you acknowledged were vestiges of the prior segregation have been eliminated to the extent practicable in the Kansas City School District?
>
> "A: No, that's not the purpose of my testimony, Mr. Benson." *Id.*, at 483.

Nor did the State focus on its own good faith in complying with the District Court's decree; it emphasized instead the district's commitment to the decree and to the constitutional provisions on which the decree rested. State's Response 8. The State, indeed, said nothing to contradict the very findings made elsewhere by the District Court that have called the State's own commitment to the success of the decree into question. See, *e. g.*, 1 App. 136 (Order of Nov. 12, 1986) ("[D]uring the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program"); see also App. to Pet. for Cert. A–123 (Order of Apr. 16, 1993) ("The State, also a constitutional violator, has historically opposed the implementation of any program offered to desegregate the KCMSD. The Court recognizes that the State has had to bear the brunt of the costs of desegregation due to the joint and several liability finding previously made by the Court. However, the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD") (emphasis in original).

Thus, it was the State's failure to meet or even to recognize its burden under *Freeman* that led the Court of Appeals to reject the suggestion that it make a finding of partial unitary status as to the district's *Milliken II* education programs:

> "It is . . . significant that the testimony of [the State's expert] did no more than describe the successful establishment of the several educational programs, but gave no indication of whether these programs had succeeded in improving student achievement. . . .
>
> "The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. . . .

> ". . . [Further, the] State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree. . . .
>
> * * * * *
>
> ". . . [T]he district court did not abuse its discretion in continuing the quality education programs." 11 F. 3d, at 764–765 (citations omitted).

Examining only the first *Freeman* prong, there can be no doubt that the Court of Appeals was correct. *Freeman* and *Dowell* make it entirely clear that the central focus of this prong of the unitary status enquiry is on effects: to the extent reasonably possible, a constitutional violator must remedy the ills caused by its actions before it can be freed of the court-ordered obligations it has brought upon itself. Under the logic of the State's arguments to the District Court, the moment the *Milliken II* programs were put in place, the State was at liberty to walk away from them, no matter how great the remaining consequences of segregation for educational quality or how great the potential for curing them if state funding continued.

Looking ahead, if indeed the State believes itself entitled to a finding of partial unitary status on the subject of educational programs, there is an orderly procedural course for it to follow. It may frame a proper motion for partial unitary status, and prepare to make a record sufficient to allow the District Court and the Court of Appeals to address the continued need for and efficacy of the *Milliken II* programs.

In the development of a proper unitary status record, test scores will undoubtedly play a role. It is true, as the Court recognizes, that all parties to this case agree that it would be error to require that the students in a school district attain the national average test score as a prerequisite to a finding of partial unitary status, if only because all sorts of causes independent of the vestiges of past school segregation might stand in the way of the goal. *Ante*, at 101–102. That said, test scores will clearly be relevant in determining whether the improvement programs have cured a deficiency in student achievement to the practicable extent. The District Court has noted (in the finding that the Court would read as a dispositive requirement for unitary status) that while students' scores have shown a trend of improvement, they remain at or below national norms. App. to Pet. for Cert. A–131 (Order of Apr. 16, 1993). The significance of this fact is subject to assessment. Depending, of course, on other facts developed in the course of unitary status proceedings, the improvement to less than the national average might reasonably be taken to show that education programs are having a good effect on student achievement, and that further improvement can be expected. On the other hand, if test-score changes were shown to have flattened out, that might suggest the impracticability of any additional remedial progress. While the significance of scores is thus open to judgment, the judgment is not likely to be very sound unless it is informed by more of a record than we have in front of us, and the Court's admonition that the District Court should "sharply limit" its reliance on test scores, *ante*, at 101, should be viewed in this light.

B

The other question properly before us has to do with the propriety of the District Court's recent salary orders. While the Court suggests otherwise, *ante*, at 84, 100, the District Court did not ground its orders of salary increases solely on the goal of attracting students back to the KCMSD. From the start, the District Court has consistently treated salary increases as an important element in remedying the systemwide reduction in student achievement resulting from segregation in the KCMSD. As noted above, the Court does not question this remedial goal, which we expressly approved in *Milliken II*. See *supra*, at 141–143. The only issue, then, is whether the salary increases ordered by the District Court have been reasonably related to achieving that goal, keeping in mind the broad discretion enjoyed by the District Court in exercising its equitable powers.

The District Court first ordered KCMSD salary increases, limited to teachers, in 1987, basing its decision on the need to raise the level of student achievement. "[I]t is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Jenkins,* 672 F. Supp., at 410. The State raised no objection to the District Court's order, and said nothing about the issue of salary increases in its 1988 appeal to the Eighth Circuit.

When the District Court's 1987 order expired in 1990, all parties, including the State, agreed to a further order increasing salaries for both instructional and noninstructional personnel through the 1991–1992 school year. 1 App. 332–337 (Order of July 23, 1990). In 1992 the District Court merely ordered that salaries in the KCMSD be maintained at the same level for the following year, rejecting the State's argument that desegregation funding for salaries should be discontinued, App. to Pet. for Cert. A–76 to A–93 (Order of June 25, 1992), and in 1993 the District Court ordered small salary increases for both instructional and noninstructional personnel through the end of the 1995–1996 school year, App. to Pet. for Cert. A–94 to A–109 (Order of June 30, 1993).

It is the District Court's 1992 and 1993 orders that are before us, and it is difficult to see how the District Court abused its discretion in either instance. The District Court had evidence in front of it that adopting the State's position and discontinuing desegregation funding for salary levels would result in their abrupt drop to 1986–1987 levels, with the resulting disparity between teacher pay in the district and the nationwide level increasing to as much as 40 to 45 percent, and a mass exodus of competent employees likely taking place. *Id.,* at A–76, A–78 to A–91. Faced with this evidence, the District Court found that continued desegregation funding of salaries, and small increases in those salaries over time, were essential to the successful implementation of its remedial scheme, including the elevation of student achievement:

> "[I]n the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan. . . .
>
> . . . . .
>
> "High quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation,' but also to 'ensure that there is no diminution in the quality of its regular academic program.' . . .
>
> ". . . There is no question but that a salary roll back would have effects that would drastically impair implementation of the desegregation remedy.
>
> . . . . .
>
> ". . . A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan." *Id.*, at A–86 to A–91 (Order of June 25, 1992), quoting *Jenkins*, 855 F. 2d, at 1301, and *Jenkins*, 672 F. Supp., at 410.

See also App. to Pet. for Cert. A–95 to A–97, A–101 to A–102 (Order of June 30, 1993). The Court of Appeals affirmed the District Court's orders on the basis of these findings, again taking special note of the importance of adequate salaries to the remedial goal of improving student achievement:

> "[Q]uality education programs and magnet schools [are] a part of the remedy for the vestiges of segregation causing a system wide reduction in student achievement in the KCMSD schools. . . . The significant finding of the [district] court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation orders, and that high

> quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD.
>
> . . . . .
>
> ". . . It is evident that the district court had before it substantial evidence of a statistically significant reduction in the turnover rates for full-time employees, a dramatic increase in the percentage of certified employees selecting KCMSD because of the salary increases, and a significant decline in the number of employees lost to other districts. Further, the court heard testimony that the average performance evaluation for the professional employees increased positively and significantly." 13 F. 3d 1170, 1172–1174 (CA8 1993).

See also 11 F. 3d, at 766–769.

There is nothing exceptionable in the lower courts' findings about the relationship between salaries and the District Court's remedial objectives, and certainly nothing in the record suggests obvious error as to the amounts of the increases ordered.[3] If it is tempting to question the place of salary increases for administrative and maintenance personnel in a desegregation order, the Court of Appeals addressed the temptation in specifically affirming the District Court's finding that such personnel are critical to the success of the desegregation effort, 13 F. 3d, at 1174 (referring to order of June 30, 1993, App. to Pet. for Cert. A–104), and did so in the circumstances of a district whose schools have been plagued by leaking roofs, defective lighting, and reeking lavatories. See *Jenkins,* 855 F. 2d, at 1306; *Jenkins,* 672 F. Supp., at 403–404. As for teachers' increases, the District Court and the Court of Appeals were beyond reproach in finding and affirming that in order to remedy the educational deficits flowing from segregation in the KCMSD, "those persons charged with implementing the [remedial] plan [must] be the most qualified persons reasonably attainable," App. to Pet. for Cert. A–102.

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[3] There is no claim of anything unreasonable in the salary increases merely because the District Court has ordered them, whereas they might otherwise have been set by collective bargaining. For that matter, the Court of Appeals observed that the District Court has not replaced collective bargaining in the KCMSD with a rubber stamping of union requests, but rather has "juridically pruned applications of funding that have been presented to it," 13 F. 3d, at 1174, ordering salary increases that have been far smaller than those requested by the union. See, *e. g.*, App. to Pet. for Cert. A–102, A–104 to A–106 (Order of June 30, 1993).

Indeed, the Court does not question the District Court's salary orders insofar as they relate to the objective of raising the level of student achievement in the KCMSD, but rather overlooks that basis for the orders altogether. The Court suggests that the District Court rested its approval of salary increases only on the object of drawing students into the district's schools, *ante,* at 91, and rejects the increases for that reason. It seems clear, however, that the District Court and the Court of Appeals both viewed the salary orders as serving two complementary but distinct purposes, and to the extent that the District Court concludes on remand that its salary orders are justified by reference to the quality of education alone, nothing in the Court's opinion precludes those orders from remaining in effect.

III

The two discrete questions that we actually accepted for review are, then, answerable on their own terms without any need to consider whether the District Court's use of the magnet school concept in its remedial plan is itself constitutionally vulnerable. The capacity to deal thus with the questions raised, coupled with the unfairness of doing otherwise without warning, are enough to demand a dissent.

But there is more to fuel dissent. On its face, the Court's opinion projects an appealing pragmatism in seeming to cut through the details of many facts by applying a rule of law that can claim both precedential support and intuitive sense, that there is error in imposing an interdistrict remedy to cure a merely intradistrict violation. Since the District Court has consistently described the violation here as solely intradistrict, and since the object of the magnet schools under its plan includes attracting students into the district from other districts, the Court's result seems to follow with the necessity of logic, against which arguments about detail or calls for fair warning may not carry great weight.

The attractiveness of the Court's analysis disappears, however, as soon as we recognize two things. First, the District Court did not mean by an "intradistrict violation" what the Court apparently means by it today. The District Court meant that the violation within the KCMSD had not led to segregation outside of it, and that no other school districts had played a part in the violation. It did not mean that the violation had not produced effects of any sort beyond the district. Indeed, the record that we have indicates that the District Court understood that the violation here did produce effects spanning district borders and leading to greater segregation within the KCMSD, the reversal of which the District Court sought to accomplish by establishing magnet schools.[4] Insofar as the Court assumes that this was not so in fact, there is at least enough in the record to cast serious doubt on its assumption. Second, the Court violates existing case law even on its own apparent view of the facts, that the segregation violation within the KCMSD produced no proven effects, segregative or otherwise, outside it. Assuming this to be true, the Court's decision that the rule against interdistrict remedies for intradistrict violations applies to this case, solely because the remedy here is meant to produce effects outside the district in which the violation occurred, is flatly contrary to established precedent.

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[4] This was not the only, or even the principal, purpose of the magnet schools. The District Court found that magnet schools would assist in remedying the deficiencies in student achievement in the KCMSD, see *supra*, at 141–142. Moreover, while the Court repeatedly describes the magnet school program as looking beyond the boundaries of the district, the program is primarily aimed not at drawing back white children whose parents have moved to another district, but rather at drawing back children who attend private schools while living within the geographical confines of the KCMSD, whose population remains majority white, *Jenkins* v. *Missouri*, 855 F. 2d 1295, 1302–1303 (CA8 1988). See 1 App. 132 (Order of Nov. 12, 1986) ("Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs"). As such, a substantial impetus for the District Court's remedy does not consider the world beyond district boundaries at all, and much of the Court's opinion is of little significance to the case before it.

A

The Court appears to assume that the effects of segregation were wholly contained within the KCMSD, and based on this assumption argues that any remedy looking beyond the district's boundaries is forbidden. The Court's position rests on the premise that the District Court and the Court of Appeals erred in finding that segregation had produced effects outside the district, and hence were in error when they treated the reversal of those effects as a proper subject of the equitable power to eliminate the remaining vestiges of the old segregation so far as practicable.

The Court has not shown the trial court and the Eighth Circuit to be wrong on the facts, however, and on the record before us this Court's factual assumption is at the very least a questionable basis for removing one major foundation of the desegregation decree. I do not, of course, claim to be in a position to say for sure that the Court is wrong, for I, like the Court, am a victim of an approach to the case uninformed by any warning that a foundational issue would be dispositive. My sole point is that the Court is not in any obvious sense correct, wherever the truth may ultimately lie.

To be sure, the District Court found, and the Court of Appeals affirmed, that the suburban school districts (SSD's) had taken no action contributing to segregation in the KCMSD. *Jenkins* v. *Missouri*, 807 F. 2d 657, 664, 668–670 (CA8 1986);

3 App. 723, 738 (Order of June 5, 1984). Those courts further concluded that the constitutional violations committed by the State and the KCMSD had not produced any significant segregative effects in the SSD's, all of which have operated as unitary districts since shortly after our decision in *Brown*. *Jenkins*, 807 F. 2d, at 672, 678; 3 App. 813, 816. It was indeed on the basis of just these findings that the District Court concluded that it was dealing with an intradistrict violation, and, consistently with our decision in *Milliken I*, refused to consolidate the SSD's with the KCMSD. *Jenkins*, 807 F. 2d, at 660–661, 674; 3 App. 721–723, 725, 810–811.

There is no inconsistency between these findings and the possibility, however, that the actions of the State and the KCMSD produced significant nonsegregative effects outside the KCMSD that led to greater segregation within it. To the contrary, the District Court and the Court of Appeals concurred in finding that "the preponderance of black students in the [KCMSD] was due to the State and KCMSD's constitutional violations, which caused white flight. . . . [T]he existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools." *Jenkins*, 855 F. 2d, at 1302, citing the District Court's Order of Aug. 25, 1986, 1 App. 126 ("[S]egregated schools, a constitutional violation, ha[ve] led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools . . ."). While this exodus of white students would not have led to segregation within the SSD's, which have all been run in a unitary fashion since the time of *Brown*, it clearly represented an effect spanning district borders, and one which the District Court and the Court of Appeals expressly attributed to segregation in the KCMSD.

The Court, however, rejects the findings of the District Court, endorsed by the Court of Appeals, that segregation led to white flight from the KCMSD, and does so at the expense of another accepted norm of our appellate procedure. We have long adhered to the view that "[a] court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); see also *Branti* v. *Finkel*, 445 U. S. 507, 512, n. 6 (1980) (referring to "our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred"). The Court fails to show any exceptional circumstance present here, however: it relies on a "contradiction" that is not an obvious contradiction at all, and on an arbitrary "supposition" that " 'white flight' may result from desegregation, not *de jure* segregation," *ante*, at 95, a supposition said to be bolstered by the District Court's statement that there was "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools." 672 F. Supp., at 412.[5]

The doubtful contradiction is said to exist between the District Court's findings, on the one hand, that segregation caused white flight to the SSD's, and the Court of Appeals's conclusion, on the other, that the District Court " 'made specific findings that negate current significant interdistrict effects . . . .' " *Ante*, at 96, quoting *Jenkins*, 807 F. 2d, at 672. Any impression of contradiction quickly disappears, however, when the Court of Appeals's statement is read in context:

> "[T]he [district] court explicitly recognized that [to consolidate school districts] under *Milliken [I]* 'there

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[5] JUSTICE O'CONNOR also rests on supposition. See *ante*, at 113 ("In this case, it may be the 'myriad factors of human existence,' that have prompted the white exodus from the KCMSD . . .") (citation omitted).

> must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district.' Order of June 5, 1984 at 14, 95. . . . The district court thus dealt not only with the issue of whether the SSDs were constitutional violators but also whether there were significant interdistrict segregative effects. *See* V, *infra.* When it did so, it made specific findings that negate current significant interdistrict effects . . . ." *Ibid.*

It is clear that, in this passage, the Court of Appeals was summarizing the District Court's findings that the constitutional violations within the KCMSD had not produced any segregative effects in other districts. *Ibid.* While the Court of Appeals did not repeat the word "segregative" in its concluding sentence, there is nothing to indicate that it was referring to anything but segregative effects, and there is in fact nothing in the District Court's own statements going beyond its finding that the State and the KCMSD's actions did not lead to segregative effects in the SSD's.[6]

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[6] The Court states that the Court of Appeals would not have decided the question whether the State and the KCMSD's violations produced segregative effects in the SSD's, as respondents lacked standing to raise the issue. *Ante,* at 96, n. 9. This statement eludes explanation. In *Milliken I,* 418 U. S. 717 (1974), we held that before a district court may order the mandatory interdistrict reassignment of students throughout a metropolitan area, it must first find either that multiple school districts participated in the unconstitutional segregation of students, or that the violation within a single school district "produce[d] . . . significant segregative effect[s]" in the others. *Id.,* at 744–745. See *ante,* at 93; *ante,* at 105, 108 (O'CONNOR, J., concurring); see also *infra,* at 170–171. In the earlier stages of this litigation, the Jenkins respondents sought the mandatory reassignment of students throughout the Kansas City metropolitan area, and the District Court, 3 App. 721–820 (Order of June 5, 1984), and the Court of Appeals, *Jenkins,* 807 F. 2d, at 665–666, 672, rejected such relief on the grounds that the requirements of *Milliken I* had not been satisfied. The Court is now saying that respondents lacked standing to raise the issue of interdistrict segregative effects, and that the District Court and

There is, in turn, no contradiction between this finding and the District Court's findings about white flight: while white flight would have produced significant effects in other school districts, in the form of greatly increased numbers of white students, those effects would not have been segregative beyond the KCMSD, as the departing students were absorbed into wholly unitary systems.

Without the contradiction, the Court has nothing to justify its rejection of the District Court's finding that segregation caused white flight but its supposition that flight results from integration, not segregation. The supposition, and the distinction on which it rests, are untenable. At the more obvious level, there is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy. When the Court quotes the District Court's reference to abundant evidence that integration caused flight to the suburbs, then, it quotes nothing inconsistent with the District Court's other findings that segregation had caused the flight. The only difference between the statements lies in the point to which the District Court happened to trace the causal sequence.

The unreality of the Court's categorical distinction can be illustrated by some examples. There is no dispute that before the District Court's remedial plan was placed into effect the schools in the unreformed segregated system were physically a shambles:

> "The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments. The

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the Court of Appeals lacked the authority to reach the issue, even though that is precisely what was required of them under *Milliken I*.

> specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate acoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems. The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility." 672 F. Supp., at 403 (citations omitted).

See also *Jenkins*, 855 F. 2d, at 1300 (reciting District Court findings); *Jenkins*, 639 F. Supp., at 39–40. The cost of turning this shambles into habitable schools was enormous, as anyone would have seen long before the District Court ordered repairs. See *Missouri* v. *Jenkins*, 495 U. S., at 38–40 (discussing the costs of the remedial program and the resulting increases in tax rates within the KCMSD). Property tax-paying parents of white children, seeing the handwriting on the wall in 1985, could well have decided that the inevitable cost of cleanup would produce an intolerable tax rate and could have moved to escape it. The District Court's remedial orders had not yet been put in place. Was the white flight caused by segregation or desegregation? The distinction has no significance.

Another example makes the same point. After *Brown*, white parents likely came to understand that the practice of spending more on white schools than on black ones would be stopped at some point. If they were unwilling to raise all expenditures to match the customary white school level, they must have expected the expenditures on white schools to drop to the level of those for the segregated black schools or to some level in between. See, *e. g.*, 639 F. Supp., at 39–40 (describing a decline in all 68 of the KCMSD's school buildings in the past "10 to 15 years"). If they thus believed that the white schools would deteriorate they might then have taken steps to establish private white schools, starting a practice of local private education that has endured. Again, what sense does it make to say of this example that the cause of white private education was desegregation (not yet underway), rather than the segregation that led to it?

I do not claim that either of these possible explanations would ultimately turn out to be correct, for any such claim would head me down the same road the Court is taking, of resolving factual issues independently of the trial court without warning the respondents that the full evidentiary record bearing on the issue should be identified for us. My point is only that the Court is on shaky grounds when it assumes that prior segregation and later desegregation are separable in fact as causes of "white flight," that the flight can plausibly be said to result from desegregation alone, and that therefore as a matter of fact the "intradistrict" segregation violation lacked the relevant consequences outside the district required to justify the District Court's magnet concept. With the arguable plausibility of each of these assumptions seriously in question, it is simply rash to reverse the concurrent factual findings of the District Court and the Court of Appeals. All the judges who spoke to the issue below concluded that segregated schooling in the KCMSD contributed to the exodus of white students from the district. Among them were not only the judges most familiar with the record of this litigation, Judge Clark of the District Court and the three members of the Court of Appeals panel that has retained jurisdiction over the case, see *supra*, at 162–164, but also the five judges who dissented from the denial of rehearing en banc in the Court of Appeals (whose opinion the majority does not hesitate to rely on for other purposes):

> "[By 1985], '[w]hite flight' to private schools and to the suburbs was rampant.

> "The district court, correctly recognizing that at least part of this problem was the consequence of the de jure segregation previously practiced under Missouri constitutional and statutory law, fashioned a remedial plan for the desegregation of the KCMSD . . . ." 19 F. 3d, at 397 (Beam, J., dissenting from denial of rehearing en banc).

The reality is that the Court today overturns the concurrent factual findings of the District Court and the Court of Appeals without having identified any circumstance in the record sufficient to warrant such an extraordinary course of action.

B

To the substantial likelihood that the Court proceeds on erroneous assumptions of fact must be added corresponding errors of law. We have most recently summed up the obligation to correct the condition of *de jure* segregation by saying that "the duty of a former *de jure* district is to 'take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Freeman*, 503 U. S., at 486, quoting *Green*, 391 U. S., at 437–438. Although the fashioning of judicial remedies to this end has been left, in the first instance, to the equitable discretion of the district courts, in *Milliken I* we established an absolute limitation on this exercise of equitable authority. "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Milliken I*, 418 U. S., at 745.

The Court proceeds as if there is no question but that this proscription applies to this case. But the proscription does not apply. We are not dealing here with an interdistrict remedy in the sense that *Milliken I* used the term. In the *Milliken I* litigation, the District Court had ordered 53 surrounding school districts to be consolidated with the Detroit school system, and mandatory busing to be started within the enlarged district, even though the court had not found that any of the suburban districts had acted in violation of the Constitution. "The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district." *Id.*, at 743. It was this imposition of remedial measures on more than the one wrongdoing school district that we termed an "interdistrict remedy":

> "We . . . turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district." *Id.*, at 744.

And it was just this subjection to court order of school districts not shown to have violated the Constitution that we deemed to be in error:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. . . .
>
> ". . . To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court." *Id.*, at 744–745.

We did not hold, however, that any remedy that takes into account conditions outside of the district in which a constitutional violation has been committed is an "interdistrict remedy," and as such improper in the absence of an "interdistrict violation." To the contrary, by emphasizing that remedies in school desegregation cases are grounded in traditional equitable principles, *id.*, at 737–738, we left open the possibility that a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation.

The Court, nonetheless, reads *Milliken I* quite differently. It reads the case as categorically forbidding imposition of a remedy on a guilty district with intended consequences in a neighboring innocent district, unless the constitutional violation yielded segregative effects in that innocent district. See, *e. g., ante,* at 92 ("But this interdistrict goal [of attracting nonminority students from outside the KCMSD schools] is beyond the scope of the intradistrict violation identified by the District Court" (emphasis deleted)).

Today's decision therefore amounts to a redefinition of the terms of *Milliken I* and consequently to a substantial expansion of its limitation on the permissible remedies for prior segregation. But that is not the only prior law affected by today's decision. The Court has not only rewritten *Milliken I;* it has effectively overruled a subsequent case expressly refusing to constrain remedial equity powers to the extent the Court does today, and holding that courts ordering relief from unconstitutional segregation may, with an appropriate factual predicate, exercise just the authority that the Court today eliminates.

Two Terms after *Milliken*, we decided *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), in a unanimous opinion by Justice Stewart. The District Court in *Gautreaux* had found that the United States Department of Housing and Urban Development (HUD) and the Chicago Housing Authority (CHA) had maintained a racially segregated system of public housing within the city of Chicago, in violation of various constitutional and statutory provisions. There was no indication that the violation had produced any effects outside the city itself. The issue before us was whether "the remedial order of the federal trial court [might] extend beyond Chicago's territorial boundaries." *Id.*, at 286. Thus, while JUSTICE O'CONNOR suggests that *Gautreaux* may not have addressed the propriety of a remedy with effects going beyond the district in which the constitutional violation had occurred, *ante*, at 106, her suggestion cannot be squared with our express understanding of the question we were deciding: "the permissibility in light of *Milliken* of 'inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.'" *Gautreaux, supra*, at 292.

HUD argued that the case should turn on the same principles governing school desegregation orders and that, under *Milliken I*, the District Court's order could not look beyond Chicago's city limits, because it was only within those limits that the constitutional violation had been committed. 425 U. S., at 296–297. We agreed with HUD that the principles of *Milliken* apply outside of the school desegregation context, 425 U. S., at 294, and n. 11, but squarely rejected its restricted interpretation of those principles and its view of limited equitable authority to remedy segregation. We held that a district court may indeed subject a governmental perpetrator of segregative practices to an order for relief with intended consequences beyond the perpetrator's own subdivision, even in the absence of effects outside that subdivision, so long as the decree does not bind the authorities of other governmental units that are free of violations and segregative effects:

> "[*Milliken*'s] holding that there had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a

> judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Id.*, at 296 (footnote omitted).

In the face of *Gautreaux*'s language, the Court claims that it was only because the "'relevant geographic area for purposes of the [plaintiffs'] housing options [was] the Chicago housing market, not the Chicago city limits,'" *ante*, at 97, quoting *Gautreaux*, *supra*, at 299, that we held that "'a metropolitan area remedy . . . [was] not impermissible as a matter of law,'" *ante*, at 97, quoting *Gautreaux*, *supra*, at 306. See also *ante*, at 106 (O'CONNOR, J., concurring). But that was only half the explanation. Requiring a remedy outside the city in the wider metropolitan area was permissible not only because that was the area of the housing market even for people who lived within the city (thus relating the scope of the remedy to the violation suffered by the victims) but also because the trial court could order a remedy in that market without binding a governmental unit innocent of the violation and free of its effects. In "reject[ing] the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area," we stated plainly that "[t]he critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief." *Gautreaux*, 425 U. S., at 297. Having found HUD in violation of the Constitution, the District Court was obligated to make "every effort . . . to employ those methods [necessary] 'to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation,'" *ibid.*, quoting *Davis* v. *Board of School Comm'rs of Mobile Cty.*, 402 U. S. 33, 37 (1971), and the District Court's methods could include subjecting HUD to measures going beyond the geographical or political boundaries of its violation. "Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." 425 U. S., at 298.

On its face, the District Court's magnet school concept falls entirely within the scope of equitable authority recognized in *Gautreaux.* In *Gautreaux,* the fact that the CHA and HUD had the authority to operate outside the limits of the city of Chicago meant that an order to fund or build housing beyond those limits would "not necessarily entail coercion of uninvolved governmental units . . . ." *Id.*, at 298. Here, by the same token, the District Court has not sought to "consolidate or in any way restructure" the SSD's, *id.*, at 305–306, or, indeed, to subject them to any remedial obligation at all.[7] The District Court's remedial measures go only to the operation and quality of schools within the KCMSD, and the burden of those measures accordingly falls only on the two proven constitutional wrongdoers in this case, the KCMSD and the State. And insofar as the District Court has ordered those violators to undertake measures to increase the KCMSD's attractiveness to students from other districts and thereby to reverse the flight attributable to their prior segregative acts, its orders do not represent an abuse of discretion, but instead appear "wholly commensurate with the 'nature and extent of the constitutional violation.'" *Id.*, at 300, quoting *Milliken I,* 418 U. S., at 744.

The Court's failure to give *Gautreaux* its due points up the risks of its approach to this case. The major peril of addressing an important and complex question without adequate notice to the parties is the virtual certainty that briefing and argument will not go to the real point. If respondents had had reason to suspect that the validity of applying the District Court's remedial concept of magnet schools in this case would be the focus of consideration by this Court, they presumably would have devoted significant attention to *Gautreaux* in their briefing. As things stand, the only references to the case in the parties' briefs were two mere passing mentions by the *Jenkins* respondents and a footnote by the State implying that *Gautreaux* was of little relevance here. The State's footnote says that "in *Gautreaux*, there was evidence of suburban discrimination and of the 'extra-city impact of [HUD's] intracity discrimination.'" Brief for Petitioners 28, n. 18. That statement, however, is flatly at odds with Justice Stewart's opinion for the Court: "the Court of Appeals surmised that either an interdistrict violation or an interdistrict segregative effect may have been present in this case. There is no support provided for either conclusion. . . . [I]t is apparent that the Court of Appeals was mistaken in supposing that the [record contains] evidence of suburban discrimination justifying metropolitan area relief. . . . [And the Court of Appeals's] unsupported speculation falls far short of the demonstration of a 'significant segregative effect in another district' discussed in the *Milliken* opinion." *Gautreaux*, 425 U. S., at 294–295, n. 11.[8]

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[7] Thus, the Court errs in suggesting that the District Court has sought to do here indirectly what we held the District Court could not do directly in *Milliken I. Ante,* at 94. The District Court here has not attempted, directly or indirectly, to impose any remedial measures on school districts innocent of a constitutional violation or free from its segregative effects.

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[8] JUSTICE O'CONNOR thinks I place undue emphasis on the *Gautreaux* Court's footnote, turning it into an "island, entire of itself . . . ," *ante*, at 107, but it cannot be shrunk to the dimension necessary to support the majority's result. According to JUSTICE O'CONNOR, *Gautreaux* holds that "territorial transgression" of any kind "is permissible only upon a showing that [an] intradistrict constitutional violation [has] produced significant interdistrict segregative effects. . . ." *Ante*, at 106. She finds *Gautreaux* significant only in reversing the Court of Appeals's finding that such effects had been established on the record of that case, and she understands that the Court remanded the case to the District Court with the understanding that it would order relief going beyond the city of Chicago's

After being misrepresented by the State and mentioned only briefly by the other parties, *Gautreaux*'s holding is now effectively overruled, for the Court's opinion can be viewed as correct only on that assumption. But there is no apparent reason to reverse that decision, which represented the judgment of a unanimous Court, seems to reflect equitable common sense, and has been in the reports for two decades. While I would reserve final judgment on *Gautreaux*'s future until a time when the subject has been given a full hearing,

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boundaries only if it found significant interdistrict segregative effects to exist. *Ante*, at 107–108.

But this is an implausible reading. JUSTICE O'CONNOR is correct that in *Gautreaux* we reiterated the importance of *Milliken I*'s requirement of significant interdistrict segregative effects, but we did so only in connection with the type of relief at issue in *Milliken I*, that involving "direct federal judicial interference with local governmental entities" not shown to have violated the Constitution. *Gautreaux*, 425 U. S., at 294; see generally *id.*, at 292–298. As the language I have quoted above demonstrates, we made it very clear in *Gautreaux* that the District Court could order relief going beyond the boundaries of the city of Chicago without any finding of such effects, because that relief would impose no obligation on governmental units innocent of a constitutional violation and free of its effects. Indeed, when we summarized our holding at the conclusion of our opinion, we made the point yet again. "In sum, there is no basis for the petitioner's claim that court-ordered metropolitan area relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan area relief order directed to HUD would not consolidate or in any way restructure local governmental units." *Id.*, at 305–306. While JUSTICE O'CONNOR, *ante*, at 107–108 (and the Court, *ante*, at 97) seeks to make much of the fact that we did not order metropolitan relief ourselves in *Gautreaux*, but rather remanded the case to the District Court, we did so because we recognized that the question of what relief to order was a matter for the District Court in the first instance. "The nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion, after affording the parties an opportunity to present their views." 425 U. S., at 306. Nowhere did we state that before the District Court could order metropolitan area relief, it would first have to make findings of significant segregative effects extending beyond the city of Chicago's borders.

I realize that after today's decision there may never be an occasion for any serious examination of *Gautreaux*. If things work out that way, there will doubtless be those who will quote from *Gautreaux* to describe today's opinion as "transform[ing] *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct." *Id.*, at 300.

I respectfully dissent.

JUSTICE GINSBURG, dissenting.

I join JUSTICE SOUTER's illuminating dissent and emphasize a consideration key to this controversy.

The Court stresses that the present remedial programs have been in place for seven years. *Ante*, at 102. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.

In 1724, Louis XV of France issued the Code Noir, the first slave code for the Colony of Louisiana, an area that included Missouri. Violette, The Black Code in Missouri, in 6 Proceedings of the Mississippi Valley Historical Association 287, 288 (B. Shambaugh ed. 1913). When Missouri entered the Union in 1821, it entered as a slave State. *Id.*, at 303.

Before the Civil War, Missouri law prohibited the creation or maintenance of schools for educating blacks: "No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State." Act of Feb. 16, 1847, § 1, 1847 Mo. Laws 103.

Beginning in 1865, Missouri passed a series of laws requiring separate public schools for blacks. See, *e. g.*, Act of Mar. 29, 1866, § 20, 1865 Mo. Laws 177. The Missouri Constitution first permitted, then required, separate schools. See Mo. Const., Art. IX, § 2 (1865); Mo. Const., Art. XI, § 3 (1875).

After this Court announced its decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), Missouri's Attorney General declared these provisions mandating segregated schools unenforceable. See *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1490 (WD Mo. 1984). The statutes were repealed in 1957 and the constitutional provision was rescinded in 1976. *Ibid.* Nonetheless, 30 years after *Brown*, the District Court found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F. Supp., at 1492. The District Court concluded that "the State . . . cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law." *Id.*, at 1505. Just ten years ago, in June 1985, the District Court issued its first remedial order. *Jenkins* v. *Missouri*, 639 F. Supp. 19 (WD Mo.).

Today, the Court declares illegitimate the goal of attracting nonminority students to the Kansas City, Missouri, School District, *ante*, at 94, and thus stops the District Court's efforts to integrate a school district that was, in the 1984/1985 school year, sorely in need and 68.3% black. 639 F. Supp., at 36; see also *Jenkins* v. *Missouri*, 672 F. Supp. 400, 411 (WD Mo. 1987) (reporting that physical facilities in the School District had "literally rotted"). Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon. Cf. 11 F. 3d 755, 762 (CA8 1993) (Court of Appeals noted with approval that the District Court had ordered the School District to submit plans projecting termination of court-ordered funding at alternative intervals, running from April 1993, of three, five, seven, or, at most, ten years).

RYDER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 94–431. Argued April 18, 1995—Decided June 12, 1995

Petitioner, an enlisted member of the Coast Guard, was convicted by a court-martial of drug offenses, and the Coast Guard Court of Military Review affirmed. On rehearing, that court rejected petitioner's claim that its composition violated the Appointments Clause, U. S. Const., Art. II, §2, cl. 2, because two of the judges on petitioner's three-judge panel were civilians appointed by the General Counsel of the Department of Transportation. The Court of Military Appeals agreed with petitioner that the appointments violated the Clause under its previous decision in *United States* v. *Carpenter,* 37 M. J. 291, that appellate military judges are inferior officers who must be appointed by a President, a court of law, or a head of a department. The court nonetheless affirmed petitioner's conviction on the ground that the actions of the two civilian judges were valid *de facto,* citing *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam).*

Held: The Court of Military Appeals erred in according *de facto* validity to the actions of the civilian judges of the Coast Guard Court of Military Review. Pp. 180–188.

(a) The *de facto* officer doctrine—which confers validity upon acts performed under the color of official title even though it is later discovered that the legality of the actor's appointment or election to office is deficient—cannot be invoked to authorize the actions of the judges in question. Those cases in which this Court relied upon the doctrine in deciding criminal defendants' challenges to the authority of a judge who participated in the proceedings leading to their conviction and sentence, see, *e. g., Ball* v. *United States,* 140 U. S. 118, are distinguishable here because, *inter alia,* petitioner's claim is that there has been a trespass upon the constitutional power of appointment, not merely a misapplication of a statute providing for the assignment of already appointed judges. One who makes a timely challenge to the constitutionality of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Cf. *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 536. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments. *Buckley* v. *Valeo* and *Connor* v. *Williams,* 404 U. S. 549, which *Buckley* cited as authority, were civil cases that did not explicitly rely on the *de facto* officer doctrine in validating the past acts of public officials against constitutional challenges, and this Court is not inclined to extend those cases beyond their facts. Pp. 180–184.

(b) The Court rejects the Government's several alternative defenses of the Court of Military Appeals' decision to give its *Carpenter* holding prospective application only. First, the argument that the latter court exercised remedial discretion pursuant to *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, is unavailing because there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring the *Chevron Oil* doctrine into play. Nor is it persuasively argued that qualified immunity, which specially protects public officials from damages liability for judgment calls made in a legally uncertain environment, should be extended to protect such officials from Appointments Clause attacks, which do not involve personal damages, but can only invalidate actions taken pursuant to defective title. Similarly, the practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the Government actors' good faith, *United States* v. *Leon*, 468 U. S. 897, does not require the affirmance of petitioner's conviction, since no collateral consequence arises from rectifying an Appointments Clause violation, see *id.*, at 907, and such rectification provides a suitable incentive to make challenges under the Clause, see *id.*, at 918–921. Finally, the Government's harmless-error argument need not be considered, since it was not raised below and there is no indication that the Court of Military Appeals determined that no harm occurred in this case. The related argument that any defect in the Court of Military Review proceedings was in effect cured by review in the Court of Military Appeals must be rejected because of the difference in function and authority between the two courts. Petitioner is therefore entitled to a hearing before a properly appointed panel of the Coast Guard Court of Military Review. Pp. 184–188.

39 M. J. 454, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Allen Lotz argued the cause and filed a brief for petitioner. With him on the briefs were *G. Arthur Robbins* and *Alan B. Morrison.*

Deputy Solicitor General Wallace argued the cause for the United States. On the brief were *Solicitor General*

Days, Deputy Solicitor General Dreeben, Malcolm L. Stewart, and *Paul M. Geier.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, an enlisted member of the United States Coast Guard, challenges his conviction by a court-martial. His conviction was affirmed first by the Coast Guard Court of Military Review, and then by the United States Court of Military Appeals.[1] The latter court agreed with petitioner that the two civilian judges who served on the Court of Military Review had not been appointed in accordance with the dictates of the Appointments Clause, U. S. Const., Art. II, §2, cl. 2, but nonetheless held that the actions of those judges were valid *de facto.* We hold that the judges' actions were not valid *de facto.*

Petitioner was convicted of several drug offenses, and was sentenced by a general court-martial to five years' confinement (later reduced to three years), forfeiture of pay, reduction in grade, and a dishonorable discharge. He appealed to the Coast Guard Court of Military Review, which, except in one minor aspect, affirmed his conviction. 34 M. J. 1077 (1992). On request for rehearing, petitioner challenged the composition of that court as violative of the Appointments Clause of the Constitution because two of the judges on the three-judge panel were civilians appointed by the General Counsel of the Department of Transportation. The court granted rehearing and rejected this challenge. 34 M. J. 1259 (1992).

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[1] The National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103–337, §924, 108 Stat. 2831, changed the nomenclature for the military appellate courts. The previous "Court[s] of Military Review" were rechristened as the "Court[s] of Criminal Appeals" and the previous "United States Court of Military Appeals" was redesignated as the "United States Court of Appeals for the Armed Forces." We adhere to the former names consistent with all previous proceedings in this case.

The Court of Military Appeals likewise affirmed petitioner's conviction, 39 M. J. 454 (1994), although it agreed with petitioner that the appellate judges on the Coast Guard Court of Military Review had been appointed in violation of the Appointments Clause. The court relied for this conclusion on its previous decision in *United States* v. *Carpenter*, 37 M. J. 291 (1993), where it had decided that appellate military judges are inferior officers whose service requires appointment by a President, a court of law, or a head of a department. U. S. Const., Art. II, § 2, cl. 2.[2] Despite finding a constitutional violation in the appointment of two judges on petitioner's three-judge appellate panel, the Court of Military Appeals affirmed his conviction on the ground that the actions of these judges were valid *de facto*, citing *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. We granted certiorari. 513 U. S. 1071 (1995).

The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. *Norton* v. *Shelby County*, 118 U. S. 425, 440 (1886). "The de facto doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office." 63A Am. Jur. 2d, Public Officers and Employees §578, pp. 1080–1081 (1984) (footnote omitted). The doctrine has been relied upon by this Court in several cases involving challenges by criminal defendants to the authority of a judge who participated in some part of the proceedings leading to their conviction and sentence.

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[2] The Appointments Clause reads in full:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, § 2, cl. 2.

In *Ball* v. *United States*, 140 U. S. 118 (1891), a Circuit Judge assigned a District Judge from the Western District of Louisiana to sit in the Eastern District of Texas as a replacement for the resident judge who had fallen ill and who later died. The assigned judge continued to sit until the successor to the deceased judge was duly appointed. The assigned judge had sentenced Ball after the resident judge had died, and Ball made no objection at that time. Ball later moved in arrest of judgment challenging the sentence imposed upon him by the assigned judge after the death of the resident judge, but this Court held that the assigned judge "was judge *de facto* if not *de jure*, and his acts as such are not open to collateral attack." *Id.*, at 128–129.

Similarly, in *McDowell* v. *United States*, 159 U. S. 596 (1895), a Circuit Judge assigned a judge from the Eastern District of North Carolina to sit as a District Judge in the District of South Carolina until a vacancy in the latter district was filled. McDowell was indicted and convicted during the term in which the assigned judge served, but made no objection at the time of his indictment or trial. He later challenged the validity of his conviction because of a claimed error in the assigned judge's designation. This Court decided that the assigned judge was a "judge *de facto*," and that "his actions as such, so far as they affect third persons, are not open to question." *Id.*, at 601. The Court further observed that McDowell's claim "presents a mere matter of statutory construction . . . . It involves no trespass upon the executive power of appointment." *Id.*, at 598. In a later case, *Ex parte Ward*, 173 U. S. 452 (1899), petitioner sought an original writ of habeas corpus to challenge the authority of the District Judge who had sentenced him on the grounds that the appointment of the judge during a Senate recess was improper. This Court held that "the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." *Id.*, at 456.

In the case before us, petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review. Unlike the defendants in *Ball, McDowell,* and *Ward,* petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case. And his claim is based on the Appointments Clause of Article II of the Constitution—a claim that there *has* been a "trespass upon the executive power of appointment," *McDowell, supra,* at 598, rather than a misapplication of a statute providing for the assignment of already appointed judges to serve in other districts.

In *Buckley* v. *Valeo, supra,* at 125, we said "[t]he Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States' but the drafters had a less frivolous purpose in mind." The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag* v. *Commissioner,* 501 U. S. 868, 878 (1991). In *Glidden Co.* v. *Zdanok,* 370 U. S. 530 (1962), we declined to invoke the *de facto* officer doctrine in order to avoid deciding a question arising under Article III of the Constitution, saying that the cases in which we had relied on that doctrine did not involve "basic constitutional protections designed in part for the benefit of litigants." *Id.*, at 536 (plurality opinion). We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

The Court of Military Appeals relied, not without reason, on our decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976). There, plaintiffs challenged the appointment of the Federal Election Commission members on separation-of-powers grounds. The Court agreed with them and held that the appointment of four members of the Commission by Congress, rather than the President, violated the Appointments Clause. It nonetheless quite summarily held that the "past acts of the Commission are therefore accorded *de facto* validity." *Id.*, at 142. We cited as authority for this determination *Connor* v. *Williams*, 404 U. S. 549, 550–551 (1972), in which we held that legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment were not therefore void.

Neither *Buckley* nor *Connor* explicitly relied on the *de facto* officer doctrine, though the result reached in each case validated the past acts of public officials. But in *Buckley*, the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them. And *Connor*, like other voting rights cases, see *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 572 (1969); *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969) *(per curiam)*, did not involve a defect in a specific officer's title, but rather a challenge to the composition of an entire legislative body. The Court assumed, *arguendo*, that an equal protection violation infected the District Court's reapportionment plan, declined to invalidate the elections that had already occurred, and reserved judgment on the propriety of the prospective relief requested by petitioners pending completion of further District Court proceedings that could rectify any constitutional violation present in the court-ordered redistricting plan. *Connor*, *supra*, at 550–

551. To the extent these civil cases may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend them beyond their facts.[3]

The Government alternatively defends the decision of the Court of Military Appeals on the grounds that it was, for several reasons, proper for that court to give its decision in *Carpenter*—holding that the appointment of the civilian judges to the Coast Guard Court of Military Review violated the Appointments Clause—prospective application only. It first argues that the Court of Military Appeals exercised remedial discretion pursuant to *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).[4] But whatever the continuing validity of

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[3] For similar reasons, we do not find instructive the Court's disposition of petitioner's challenge in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982). The Court declared the broad grant of jurisdiction to Article I bankruptcy courts unconstitutional and applied its decision prospectively only. *Id.*, at 88. But in doing so, it affirmed the judgment of the District Court, which had dismissed petitioner's bankruptcy action and afforded respondent the relief requested pursuant to its constitutional challenge. *Id.*, at 57. So *Northern Pipeline* is not a case in which the Court invoked the *de facto* officer doctrine to deny relief to the party before it and therefore does not support the Government in this case.

[4] The Government advances a virtual cornucopia of factors more or less peculiar to this case which it says validate the Court of Military Appeals' exercise of discretion in this case and thus support affirmance. It points to the lack of any substantial impact that the improper appointments had on petitioner's appeal, to the lack of any constitutional right to appellate review, and to the deference owed the military and the public interest in avoiding disruption of that system. Brief for United States 22. At oral argument, it also contended that subsequent action taken by the Secretary of Transportation to cure the Appointments Clause error, the fact that petitioner's underlying claims of error were meritless, and the fact that the civilian judges in this case had previously served under proper appointments while on active duty were relevant criteria. Tr. of Oral Arg. 29–30, 33–34. The substance, if not the form, of several of these arguments is discussed and rejected in the text. Those that are not discussed are alternative grounds for affirmance which the Government did not raise below, see Answer to Supplement for Petition for Review in No. 68449 (Ct. Mil. App.), pp. 2–4, and which we decline to reach. *Jenkins* v. *Anderson*,

Chevron Oil after *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86 (1993), and *Reynoldsville Casket Co.* v. *Hyde,* 514 U. S. 749 (1995), there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play. The parties agree that the defective appointments of the civilian judges affect only between 7 to 10 cases pending on direct review. As for the Government's concern that a flood of habeas corpus petitions will ensue, precedent provides little basis for such fears. *Ex parte Ward,* 173 U. S. 452 (1899).

Nor does the Government persuade us that the inquiry into clearly established law as it pertains to qualified immunity counsels in favor of discretion to deny a remedy in this case. Qualified immunity specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment. *Harlow* v. *Fitzgerald,* 457 U. S. 800, 806 (1982) ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from *suits for damages*" (emphasis added)). Providing relief to a claimant raising an Appointments Clause challenge does not subject public officials to personal damages that represent a "potentially disabling threa[t] of liability," but only invalidates actions taken pursuant to defective title. The qualified immunity doctrine need not be extended to protect public officials from such attacks.

Similarly, the practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the good faith of the Government actors, *United States* v. *Leon,* 468 U. S. 897 (1984), does not require the affirmance of petitioner's conviction in this case. Finding the deterrent remedy of suppression not compelled by the Fourth Amendment, *id.,* at 910, that case specifically relied on the "objectionable collateral consequence of [the] interference with the criminal justice system's

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447 U. S. 231, 234–235, n. 1 (1980); *FTC* v. *Grolier Inc.,* 462 U. S. 19, 23, n. 6 (1983).

truth-finding function" in requiring a blanket exclusionary remedy for all violations, *id.*, at 907, and the relative ineffectiveness of such remedy to deter future Fourth Amendment violations in particular cases, *id.*, at 918–921. No similar collateral consequence arises from rectifying an Appointments Clause violation, and correcting Appointments Clause violations in cases such as this one provides a suitable incentive to make such challenges.

The Government finally suggests that the Court of Military Appeals applied something akin to a harmless-error doctrine in affirming petitioner's conviction, refusing to redress the violation because petitioner suffered no adverse consequences from the composition of the court. Brief for United States 33. The Government did not argue below that the error, assuming it occurred, was harmless, and there is no indication from the Court of Military Appeals' summary disposition of this issue that it determined that no harm occurred in this case. We therefore need not address whether the alleged defects in the composition of petitioner's appellate panel are susceptible to harmless-error review. The Government also argues, at least obliquely, that whatever defect there may have been in the proceedings before the Coast Guard Court of Military Review was in effect cured by the review available to petitioner in the Court of Military Appeals. *Id.*, at 24, n. 16. Again, because of the hierarchical nature of sentence review in the system of military courts, we need not address whether this defect is susceptible to the cure envisioned by the Government.

Congress has established three tiers of military courts pursuant to its power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, §8, cl. 14. Cases such as the present one are tried before a general court-martial consisting of a military judge and not less than five service members or by a military judge alone. Art. 16(1), UCMJ, 10 U. S. C. §816(1). Four Courts of Military Review (one each for the Army, Air Force, Coast

Guard, and Navy-Marine Corps) hear appeals from courts-martial in cases where the approved sentence involves death, dismissal of a commissioned officer, punitive discharge, or confinement for one year or more. Art. 66, UCMJ, 10 U. S. C. §866(b)(1). These courts, which sit in panels of three or more, exercise *de novo* review over the factual findings and legal conclusions of the court-martial. Art. 66(c), UCMJ, 10 U. S. C. §866(c).[5]

The court of last resort in the military justice system is the Court of Military Appeals. Five civilian judges appointed by the President and confirmed by the Senate constitute the court. Art. 142, UCMJ, 10 U. S. C. §942 (1988 ed., Supp. V). The court grants review in cases decided by the Courts of Military Review "upon petition of the accused and on good cause shown." Art. 67, UCMJ, 10 U. S. C. §867(a) (1988 ed., Supp. V). The scope of review is narrower than the review exercised by the Court of Military Review; so long as there is some competent evidence in the record to establish the elements of an offense beyond a reasonable doubt, the Court of Military Appeals will not reevaluate the facts. *United States* v. *Wilson*, 6 M. J. 214 (1979).

Examining the difference in function and authority between the Coast Guard Court of Military Review and the Court of Military Appeals, it is quite clear that the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter. It simply cannot be said, therefore, that review by the properly constituted Court of Military Appeals gave petitioner all the possibility for relief that review by a properly constituted Coast Guard Court of Military Review would have given him. We therefore hold that the Court of Military Appeals erred in according *de facto* validity to the actions of the civilian judges of the Coast Guard Court of Military Review. Petitioner is entitled to a hearing before a properly appointed panel of that court. The judgment is reversed, and the case is remanded for proceedings consistent with this opinion.

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[5] The Court of Military Review "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." Art. 66(c), UCMJ, 10 U. S. C. §866(c).

It is so ordered.

CITY OF MILWAUKEE *v.* CEMENT DIVISION, NATIONAL GYPSUM CO., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 94–788. Argued April 24, 1995—Decided June 12, 1995

After a ship owned by the Cement Division of National Gypsum Co. and insured by the other respondents sank in a winter storm while berthed in a slip owned by petitioner Milwaukee (City), National Gypsum brought this admiralty suit for damages, alleging that the City had negligently breached its duty as a wharfinger. The City denied fault and filed a counterclaim for damage to its dock, alleging that National Gypsum was negligent in leaving the ship virtually unmanned. During the course of the litigation, the District Court, *inter alia*, found that both parties were negligent and apportioned liability primarily to National Gypsum; entered a partial judgment for the stipulated amount of respondents' damages, excluding prejudgment interest; and denied respondents' request for such interest, holding that the fact that National Gypsum's loss was primarily attributable to its own negligence and the existence of a genuine dispute over the City's liability were special circumstances justifying a departure from the general rule that prejudgment interest should be awarded in maritime collision cases. The Court of Appeals disagreed and reversed the latter ruling, holding, among other things, that mutual fault cannot provide a basis for denying prejudgment interest after this Court, in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, announced a rule requiring that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made.

Held: Neither a good-faith dispute over liability nor the existence of mutual fault justifies the denial of prejudgment interest in an admiralty collision case. Throughout history, such cases have established a general rule that prejudgment interest should be awarded, subject to a limited exception for "peculiar" or "exceptional" circumstances. The existence of a legitimate difference of opinion on the liability issue is not such a circumstance, but is merely a characteristic of most ordinary lawsuits. Nor does the magnitude of the plaintiff's fault qualify as a "peculiar" feature. Although it might appear somewhat inequitable to award a large sum in prejudgment interest against a relatively innocent party, any unfairness is illusory, because the relative fault of the parties has already been taken into consideration under the *Reliable Transfer* rule in calculating the amount of the loss for which the relatively innocent party is responsible. In light of *Reliable Transfer,* a denial of prejudgment interest on the basis of mutual fault would unfairly penalize a party twice for the same mistake. Pp. 194–199.

31 F. 3d 581, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except BREYER, J., who took no part in the consideration or decision of the case.

David A. Strauss argued the cause for petitioner. With him on the briefs were *Grant F. Langley, Rudolph M. Konrad,* and *Michael Sturley.*

Harney B. Stover, Jr., argued the cause and filed a brief for respondents.

JUSTICE STEVENS delivered the opinion of the Court.

This is an admiralty case in which the plaintiff's loss was primarily attributable to its own negligence. The question presented is whether that fact, together with the existence of a genuine dispute over liability, justified the District Court's departure from the general rule that prejudgment interest should be awarded in maritime collision cases.

I

Respondents are the owner and the insurers of the *E. M. Ford,* a ship that sank in Milwaukee's outer harbor on Christmas Eve 1979. At the time of this disaster, the *Ford* was berthed in a slip owned by the city of Milwaukee (City). In the course of a severe storm, she broke loose from her moorings, battered against the headwall of the slip, took on water, and sank. She was subsequently raised and repaired.

In 1980 the *Ford*'s owner, the Cement Division of National Gypsum Co. (National Gypsum), brought suit against the City, invoking the District Court's admiralty and maritime jurisdiction.[1] The complaint alleged that the City had breached its duty as a wharfinger by assigning the vessel to a berthing slip known to be unsafe in heavy winds and by failing to give adequate warning of hidden dangers in the slip. The plaintiff sought damages of $4.5 million, later increased to $6.5 million. The City denied fault and filed a $250,000 counterclaim for damage to its dock. The City alleged that National Gypsum was negligent in leaving the ship virtually unmanned in winter, with no means aboard for monitoring weather conditions or summoning help.

In 1986 the District Court conducted a 3-week trial on the issue of liability. Finding that both National Gypsum and the City had been negligent, the court determined that the owner bore 96% of the responsibility for the disaster, while the City bore 4% of the fault. Given the disparity in the parties' damages, a final judgment giving effect to that allocation (and awarding the damages sought in the pleadings) would have essentially left each party to bear its own losses.

Respondents took an interlocutory appeal from the District Court's ruling.[2] The Court of Appeals for the Seventh Circuit agreed with the District Court's conclusion that both parties were at fault, and that the owner's negligence was "more egregious" than the City's, but it rejected the allocation of 96% of the responsibility to the owner as clearly erroneous. *Cement Div., National Gypsum Co.* v. *Milwaukee*, 915 F. 2d 1154, 1159 (1990), cert. denied, 499 U. S. 960 (1991). After making its own analysis of the record, the Court of

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[1] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U. S. C. § 1333(1).

[2] Such appeals are authorized by 28 U. S. C. § 1292(a)(3), which states: "(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: . . . (3) Interlocutory decrees of . . . district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Appeals apportioned liability two-thirds to National Gypsum and one-third to the City. 915 F. 2d, at 1160.

Thereafter the parties entered into a partial settlement fixing respondents' damages, excluding prejudgment interest, at $1,677,541.86.[3] The parties agreed that any claim for interest would be submitted to the District Court for decision. A partial judgment for the stipulated amount was entered and satisfied.

Respondents then sought an award of over $5.3 million in prejudgment interest.[4] The District Court denied respondents' request. It noted that "an award of prejudgment interest calculated from the date of the loss is the rule rather than the exception in cases brought under a district court's admiralty jurisdiction," App. to Pet. for Cert. 21a, but held that special circumstances justified a departure from that rule in this case. The court explained:

> "In the instant case the record shows that from the outset there has been a genuine dispute over [respondents'] good faith claim that the City of Milwaukee was negligent for failing to warn the agents of [National

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[3] In arriving at this sum, the parties agreed that respondents' damages were slightly more than $5.4 million, while the City's damages were just over $192,000. The parties multiplied respondents' damages by one-third, resulting in a subtotal of $1,805,829.98 for which the City was responsible. From this subtotal, the parties subtracted two-thirds of the City's damages, or $128,288.12, as an offset because that was the amount of National Gypsum's responsibility. The difference was the City's obligation to respondents. App. 40–45.

[4] This figure was based on respondents' assertion that prejudgment interest should be compounded continuously, from the time of the sinking of the *Ford*, at the commercial prime rate of interest averaged over the period of assessment. Plaintiff's Brief on Issue of Prejudgment Interest in No. 80–C–1001 (ED Wis.), pp. 24–26. The District Court did not express any view on the correctness of this analysis, nor do we. We merely note in passing that the discrepancy between the damages award and the interest sought by National Gypsum is in some measure attributable to the delays that have plagued this litigation—a factor that does not appear to be traceable to the fault of any party.

> Gypsum] (who were planning to leave the FORD unmanned during the Christmas holidays) that a winter storm could create conditions in the outer harbor at Milwaukee which could damage the ship. The trial court and the court of appeals both found mutual fault for the damage which ensued to the ship and to the [City's] dock. The court of appeals ascribed two-thirds of the negligence to [National Gypsum]. Thus, in this situation the court concludes that [National Gypsum's] contributory negligence was of such magnitude that an award of prejudgment interest would be inequitable." *Id.*, at 22a.[5]

The Court of Appeals reversed. 31 F. 3d 581 (1994). It noted that prior to this Court's announcement of the comparative fault rule in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975), some courts had denied prejudgment interest in order to mitigate the harsh effects of the earlier rule commanding an equal division of damages whenever a collision resulted from the fault of both parties, even though one party was only slightly negligent. In the court's view, however, after the divided damages rule was "thrown overboard" and replaced with comparative fault, mutual fault could no longer provide a basis for denying prejudgment interest. 31 F. 3d, at 584–585. The Court of Appeals also read our decision in *West Virginia* v. *United States*, 479 U. S. 305, 311, n. 3 (1987), as disapproving of a "balancing of the equities" as a method of deciding whether to allow prejudgment interest. 31 F. 3d, at 585.

The Court of Appeals' decision deepened an existing Circuit split regarding the criteria for denying prejudgment interest in maritime collision cases. Compare, *e. g.*, *Inland*

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[5] The District Court also relied on the City's status as a municipality as an alternative ground for denying prejudgment interest. App. to Pet. for Cert. 22a–23a. The Court of Appeals rejected this portion of the District Court's analysis as inconsistent with Circuit precedent, and the City did not pursue the argument in this Court.

Oil & Transport Co. v. *Ark-White Towing Co.*, 696 F. 2d 321 (CA5 1983) (genuine dispute over good-faith claim in mutual fault setting justifies denial of prejudgment interest), with *Alkmeon Naviera, S. A.* v. *M/V Marina L*, 633 F. 2d 789 (CA9 1980) (contrary rule). We granted certiorari, 513 U. S. 1072 (1995), and now affirm.

II

Although Congress has enacted a statute governing the award of postjudgment interest in federal court litigation, see 28 U. S. C. § 1961, there is no comparable legislation regarding prejudgment interest. Far from indicating a legislative determination that prejudgment interest should not be awarded, however, the absence of a statute merely indicates that the question is governed by traditional judge-made principles. *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 336–337 (1988); *Rodgers* v. *United States*, 332 U. S. 371, 373 (1947). Those principles are well developed in admiralty, where "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies." *Reliable Transfer*, 421 U. S., at 409.

Throughout our history, admiralty decrees have included provisions for prejudgment interest. In *Del Col* v. *Arnold*, 3 Dall. 333, a prize case decided in 1796, we affirmed a decree awarding the libellant interest from "the day of capture." *Id.*, at 334. In *The Amiable Nancy*, 3 Wheat. 546 (1818), we considered a similar decree. In augmenting the damages awarded by the lower court, we directed that the additional funds should bear prejudgment interest, as had the damages already awarded by the lower court. *Id.*, at 562–563. *The Amiable Nancy* arose out of the "gross and wanton" seizure of a Haitian vessel near the island of Antigua by the *Scourge*, an American privateer. *Id.*, at 546–547, 558. In his opinion for the Court, Justice Story explained that even though the "loss of the supposed profits" of the *Amiable Nancy*'s voyage was not recoverable, "the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, *with interest upon such valuation*, afforded the true measure for assessing damages." *Id.*, at 560 (emphasis added). We applied the same rule in *The Umbria*, 166 U. S. 404, 421 (1897), explaining that "in cases of total loss by collision damages are limited to the value of the vessel, *with interest thereon*, and the net freight pending at the time of the collision." (Emphasis added.)[6]

The Courts of Appeals have consistently and correctly construed decisions such as these as establishing a general rule that prejudgment interest should be awarded in maritime collision cases, subject to a limited exception for "peculiar" or "exceptional" circumstances. See, *e. g.*, *Inland Oil & Transport Co.*, 696 F. 2d, at 327; *Central Rivers Towing, Inc.* v. *Beardstown*, 750 F. 2d 565, 574 (CA7 1984); *Ohio River Co.* v. *Peavey Co.*, 731 F. 2d 547, 549 (CA8 1984); *Alkmeon Naviera*, 633 F. 2d, at 797; *Parker Towing Co.* v. *Yazoo River Towing, Inc.*, 794 F. 2d 591, 594 (CA11 1986).

The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss.[7] Full compensation has long been recognized as a basic principle of admiralty law, where *"[r]estitutio in integrum* is the leading maxim applied by admiralty courts to ascertain damages resulting from a collision." *Standard Oil Co. of N. J.* v. *Southern Pacific Co.*, 268 U. S. 146, 158 (1925) (citing *The Baltimore*, 8 Wall. 377, 385 (1869)). By compensating "for the loss of use of money due as damages from the time the claim accrues until judgment is entered," *West Virginia*, 479 U. S., at 310–311, n. 2, an award of prejudgment interest helps achieve the goal of restoring a party to the condition it enjoyed before the injury occurred, *The President Madison*, 91 F. 2d 835, 845–846 (CA9 1937).

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[6] See also *The Anna Maria*, 2 Wheat. 327, 335 (1817) (Marshall, C. J.) (remanding with instructions to ascertain damages suffered by the libellants, "in doing which, the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, *with interest*, are to be allowed") (emphasis added); *The Manitoba*, 122 U. S. 97, 101 (1887) (approving, in dicta, allowance of "interest on the damages from the date of the collision to the date of the decree").

[7] We have recognized the compensatory nature of prejudgment interest in a number of cases decided outside the admiralty context. *E. g.*, *West Virginia* v. *United States*, 479 U. S. 305, 310–311, n. 2 (1987); *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168 (1933); *Miller* v. *Robertson*, 266 U. S. 243, 257–258 (1924). But cf. *Blau* v. *Lehman*, 368 U. S. 403, 414 (1962) ("'interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness'") (quoting *Board of Comm'rs of Jackson Cty.* v. *United States*, 308 U. S. 343, 352 (1939)).

Despite admiralty's traditional hospitality to prejudgment interest, however, such an award has never been automatic. In *The Scotland*, 118 U. S. 507, 518–519 (1886), we stated that the "allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury." See also *The Maggie J. Smith*, 123 U. S. 349, 356 (1887). Although we have never attempted to exhaustively catalog the circumstances that will justify the denial of interest, and do not do so today,[8] the most obvious example is the plaintiff's responsibility for "undue delay in prosecuting the lawsuit." *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 657 (1983). Other circumstances may appropriately be invoked as warranted by the facts of particular cases.

In this case, the City asks us to characterize two features of the instant litigation as sufficiently unusual to justify a departure from the general rule that prejudgment interest should be awarded to make the injured party whole. First, the City stresses the fact that there was a good-faith dispute over its liability for respondents' loss. In our view, however, this fact carries little weight. If interest were awarded as a penalty for bad-faith conduct of the litigation, the City's argument would be well taken. But prejudgment interest is not awarded as a penalty; it is merely an element of just compensation.

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[8] We do note that, as is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand. See generally Friendly, Indiscretion About Discretion, 31 Emory L. J. 747 (1982).

The City's "good-faith" argument has some resonance with the venerable common-law rule that prejudgment interest is not awarded on unliquidated claims (those where the precise amount of damages at issue cannot be computed). If a party contests liability in good faith, it will usually be the case that the party's ultimate exposure is uncertain. But the liquidated/unliquidated distinction has faced trenchant criticism for a number of years.[9] Moreover, that distinction "has never become so firmly entrenched in admiralty as it has been at law." *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583, 592 (CA2 1961).[10] Any fixed rule allowing prejudgment interest only on liquidated claims would be difficult, if not impossible, to reconcile with admiralty's traditional presumption. Yet unless we were willing to adopt such a rule—which we are not—uncertainty about the outcome of a case should not preclude an award of interest.

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[9] "It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one." *Funkhouser,* 290 U. S., at 168 (citing *Bernhard* v. *Rochester German Ins. Co.,* 79 Conn. 388, 398, 65 A. 134, 137–138 (1906); 1 T. Sedgwick, Measure of Damages § 315 (9th ed. 1912)). See also *General Motors Corp.* v. *Devex Corp.,* 461 U. S. 648, 655–656, n. 10 (1983); D. Dobbs, Law of Remedies § 3.6(3) (2d ed. 1993); C. McCormick, Law of Damages §§ 51, 54–56 (1935); Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192 (1982).

[10] A number of Circuits have rejected its applicability, at least as an absolute bar. *E. g., Borges* v. *Our Lady of the Sea Corp.,* 935 F. 2d 436, 444 (CA1 1991); *Hillier* v. *Southern Towing Co.,* 740 F. 2d 583, 586 (CA7 1984), cert. denied, 469 U. S. 1190 (1985); *Norfolk Shipbuilding & Drydock Corp.* v. *M/Y La Belle Simone,* 537 F. 2d 1201, 1204–1205, and n. 1 (CA4 1976); *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d, at 594.

In sum, the existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits. It is not an extraordinary circumstance that can justify denying prejudgment interest. See *Alkmeon Naviera*, 633 F. 2d, at 798.

The second purportedly "peculiar" feature of this case is the magnitude of the plaintiff's fault. Leaving aside the empirical question whether such a division of fault is in fact an aberration, it is true in this case that the owner of the *E. M. Ford* was primarily responsible for the vessel's loss. As a result, it might appear somewhat inequitable to award a large sum in prejudgment interest against a relatively innocent party. But any unfairness is illusory, because the relative fault of the parties has already been taken into consideration in calculating the amount of the loss for which the City is responsible.

In *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975), we "replaced the divided damages rule, which required an equal division of property damage whatever the relative degree of fault may have been, with a rule requiring that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made." *McDermott, Inc.* v. *AmClyde*, 511 U. S. 202, 207 (1994). Thus, in this case, before prejudgment interest even entered the picture, the total amount of respondents' recovery had already been reduced by two-thirds because of National Gypsum's own negligence. The City's responsibility for the remaining one-third is no different than if it had performed the same negligent acts and the owner, instead of also being negligent, had engaged in heroic maneuvers that avoided two-thirds of the damages. The City is merely required to compensate the owner for the loss for which the City is responsible.[11]

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[11] Indeed, although the amount is relatively small in this case, the City's counterclaim was resolved under the same principle. Notwithstanding its contributory negligence, the City has been compensated for two-thirds of its cost of repairing the dock and headwall. See n. 3, *supra*.

In light of *Reliable Transfer,* we are unmoved by the City's contention that an award of prejudgment interest is inequitable in a mutual fault situation. Indeed, the converse is true: a *denial* of prejudgment interest would be unfair. As JUSTICE KENNEDY noted while he was sitting on the Ninth Circuit, "under any rule allowing apportionment of liability, denying prejudgment interest on the basis of mutual fault would seem to penalize a party twice for the same mistake." *Alkmeon Naviera,* 633 F. 2d, at 798, n. 12. Such a double penalty is commended neither by logic nor by fairness; the rule giving rise to it is a relic of history that has ceased to serve any purpose in the wake of *Reliable Transfer.*

Accordingly, we hold that neither a good-faith dispute over liability nor the existence of mutual fault justifies the denial of prejudgment interest in an admiralty collision case. Questions related to the calculation of the prejudgment interest award, including the rate to be applied, have not been raised in this Court and remain open for consideration, in the first instance, by the District Court.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BREYER took no part in the consideration or decision of this case.

ADARAND CONSTRUCTORS, INC. *v.* PENA, SECRETARY OF TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 93–1841. Argued January 17, 1995—Decided June 12, 1995

Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: under one of two SBA programs—known as the 8(a) and 8(d) programs—or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents summary judgment. In affirming, the Court of Appeals assessed the constitutionality of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by *Fullilove* v. *Klutznick,* 448 U. S. 448, and *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547.

Held: The judgment is vacated, and the case is remanded.

16 F. 3d 1537, vacated and remanded.

JUSTICE O'CONNOR delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA's concurrence, concluding that:

1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor

for hiring disadvantaged subcontractors. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. Pp. 210–212.

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 212–231; 235–239.

(a) In *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While *Croson* did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273–274. Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson, supra,* at 494. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley* v. *Valeo*, 424 U. S. 1, 93. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 212–225.

(b) However, a year after *Croson*, the Court, in *Metro Broadcasting*, upheld two federal race-based policies against a Fifth Amendment challenge. The Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling* v. *Sharpe*, 347 U. S. 497, 500, by holding that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. By adopting that standard, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court's earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 225–227.

(c) The propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by a federal, state, or local actor. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled. Pp. 227–231.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases. Pp. 235–237.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." Nor did it address the question of narrow tailoring in terms of this Court's strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. Pp. 237–238.

JUSTICE SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. P. 239.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III–C. Parts I, II, III–A, III–B, III–D, and IV of that opinion were joined by REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., and by

SCALIA, J., to the extent heretofore indicated; and Part III–C was joined by KENNEDY, J. SCALIA, J., *post*, p. 239, and THOMAS, J., *post*, p. 240, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 242. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 264. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 271.

William Perry Pendley argued the cause for petitioner. With him on the briefs were *Todd S. Welch* and *Steven J. Lechner.*

Solicitor General Days argued the cause for respondents. With him on the brief were *Assistant Attorney General Patrick, Deputy Solicitor General Bender, Cornelia T. L. Pillard, David K. Flynn, Lisa C. Wilson, Paul M. Geier,* and *Edward V. A. Kussy.**

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*Briefs of *amici curiae* urging reversal were filed for Associated General Contractors of America, Inc., by *John G. Roberts, Jr., David G. Leitch,* and *Michael E. Kennedy;* for the Atlantic Legal Foundation by *Martin S. Kaufman;* for the Federalist Society, Ohio State University College of Law Chapter, by *Michael D. Rose;* for L. S. Lee, Inc., et al. by *Walter H. Ryland;* for the Pacific Legal Foundation by *Ronald A. Zumbrun, John H. Findley,* and *Anthony T. Caso;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.,* Attorney General of Maryland, and *Evelyn O. Cannon,* Assistant Attorney General, *Grant Woods,* Attorney General of Arizona, *Richard Blumenthal,* Attorney General of Connecticut, *Robert A. Marks,* Attorney General of Hawaii, *Roland W. Burris,* Attorney General of Illinois, *Pamela F. Carter,* Attorney General of Indiana, *Scott Harshbarger,* Attorney General of Massachusetts, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Tom Udall,* Attorney General of New Mexico, *G. Oliver Koppell,* Attorney General of New York, *Michael F. Easley,* Attorney General of North Carolina, *Lee Fisher,* Attorney General of Ohio, *Theodore R. Kulongoski,* Attorney General of Oregon, *Christine O. Gregoire,* Attorney General of Washington, *James E. Doyle,* Attorney General of Wisconsin, *Erias A. Hyman,* Acting Corporation Counsel for the District of Columbia, and *Eleni M. Constantine;* for the Coalition for Economic Equity et al. by *William C. McNeill III* and *Judith E. Kurtz;* for the Congressional Asian Pacific American Caucus et al. by *Koteles Alexander* and *Brian J. Murphy;* for the Congressional

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA's concurrence, and an opinion with respect to Part III–C in which JUSTICE KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied. We there-

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Black Caucus by *H. Russell Frisby, Jr.*, and *Thomas J. Madden;* for the Equality in Enterprise Opportunities Association, Inc., by *Kenneth A. Martin;* for the Latin American Management Association by *Pamela J. Mazza;* for the Lawyers' Committee for Civil Rights Under Law et al. by *John Payton, John H. Pickering, Michael A. Cooper, Herbert J. Hansell, Thomas J. Henderson, Richard T. Seymour, Sharon R. Vinick, Steven R. Shapiro, Donna R. Lenhoff,* and *Marcia D. Greenberger;* for the Minority Business Enterprise Legal Defense and Education Fund, Inc., et al. by *Donald B. Verrilli, Jr.*, and *Maureen F. Del Duca;* for the Minority Media and Telecommunications Council et al. by *David Honig* and *Angela Campbell;* for the National Association for the Advancement of Colored People by *Ronald D. Maines, Dennis Courtland Hayes,* and *Willie Abrams;* and for the National Coalition of Minority Businesses by *Weldon H. Latham.*

Briefs of *amici curiae* were filed for the NAACP Legal Defense and Educational Fund, Inc., by *Elaine R. Jones, Theodore M. Shaw, Charles Stephen Ralston,* and *Eric Schnapper;* for the National Association of Minority Businesses by *Carlos M. Sandoval* and *Warren W. Grossman;* for the Maryland Women Business Entrepreneurs Association et al. by *Kathleen T. Schwallie, Janice K. Cunningham,* and *Peter A. Teholiz;* and for the National Bar Association et al. by *J. Clay Smith, Jr.*

fore vacate the Court of Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.*, at 28–31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U. S. C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act (Act), 72 Stat. 384, as amended, 15 U. S. C. § 631 *et seq.*, declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U. S. C. § 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U. S. C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U. S. C. § 637(a)(6)(A).

In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U. S. C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e. g.*, 13 CFR §§ 124.303–124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case, 15 U. S. C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. 48 CFR §§ 19.001, 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§ 124.111(c)–(d), 124.601–124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100–17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i. e.*, eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

> "*Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .
>
> "A small business concern will be considered a DBE after it has been certified as such by the U. S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> . . . . .
>
> "The Contractor will be paid an amount computed as follows:
>
> "1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> "2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24–26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above—SBA's 8(a) or 8(d) program, or certification by a State under the DOT regulations—would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc.* v. *Skinner,* 790 F. Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F. 3d 1537 (1994). It understood our decision in *Fullilove* v. *Klutznick,* 448 U. S. 448 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F. 3d, at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F. 3d, at 1547. We granted certiorari. 512 U. S. 1288 (1994).

II

Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22–23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles* v. *Lyons,* 461 U. S. 95 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.*, at 105.

If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that, contrary to respondents' suggestion, see Brief for Respondents 29–30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 667 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at 666.

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Lujan*, *supra*, at 565, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5–A. According to documents produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90–C–1413, Exh. I, Attachment A (D. Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.;* see also *id.*, Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1½ contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.*, Exh. F, Attachments 1–3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

Respondents urge that "[t]he Subcontracting Compensation Clause program is . . . a program based on *disadvantage*, not on race," and thus that it is subject only to "the most relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.,* at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977); *Washington* v. *Davis,* 426 U. S. 229 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940's, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank* v. *United States,* 317 U. S. 329, 337 (1943); see also, *e. g., Helvering* v. *Lerner Stores Corp.,* 314 U. S. 463, 468 (1941); *LaBelle Iron Works* v. *United*

States, 256 U. S. 377, 392 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment . . . ; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.,* at 100. But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," 320 U. S., at 100, and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.,* at 102.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu* v. *United States,* 323 U. S. 214 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank,* that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." 323 U. S., at 216. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications than are the States. Cf. *id.*, at 234–235 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the *Hirabayashi* case," *id.*, at 217, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m.," *id.*, at 218, the racially discriminatory order was nonetheless within the Federal Government's power.*

In *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" *id.*, at 499. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi*, *supra*, at 100, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"

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*Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." *Korematsu*, 323 U. S., at 233. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub. L. 100–383, § 2(a), 102 Stat. 903 ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

Korematsu, supra, at 216, carry no less force in the context of federal action than in the context of action by the States—indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U. S., at 499, n. 3, and reiterated "'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the General Government, or by the States,* against any citizen because of his race,'" *id.,* at 499 (quoting *Gibson* v. *Mississippi,* 162 U. S. 565, 591 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin* v. *Florida,* 379 U. S. 184, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling* v. *Sharpe,* 347 U. S. 497, 499; and subject to the 'most rigid scrutiny,' *Korematsu* v. *United States,* 323 U. S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U. S. 81, 100." *Id.,* at 191–192.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N. C. L. Rev. 541, 554 (1977). *Loving* v. *Virginia,* 388 U. S. 1 (1967), which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" 388 U. S., at 11. The various opinions in *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed* v. *Reed,* 404 U. S. 71 (1971), a case that invalidated sex discrimination by a State, without mentioning any possibility of a difference between the standards applicable to state and federal action. *Frontiero,* 411 U. S., at 682–684 (plurality opinion of Brennan, J.); *id.,* at 691 (Stewart, J., concurring in judgment); *id.,* at 692 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 638, n. 2; see also *Buckley* v. *Valeo,* 424 U. S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *United States* v. *Paradise,* 480 U. S. 149, 166, n. 16 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, *e. g., Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100, 101–102, n. 21 (1976) (federal power over immigration), to detract from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.'" *Id.,* at 287–288 (opinion of Powell, J.) (citing *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, n. 4 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U. S., at 289–290. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.,* at 291. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.,* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. *Id.,* at 411–412, 421 (STEVENS, J., joined by Burger, C. J., and Stewart and REHN-

QUIST, JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke,* the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove* v. *Klutznick,* 448 U. S. 448 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke,* there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U. S., at 491. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *[Bakke]." Id.,* at 492. It employed instead a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.,* at 473. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either 'test' articulated in the several *Bakke* opinions." *Id.,* at 492. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his *Bakke* opinion—*i. e.,* it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest"—and had done so correctly. 448 U. S., at 496 (concurring opinion). Justice Stewart (joined by then-JUSTICE REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.,* at 523, and n. 1, and that the program before the Court failed that standard. JUSTICE STEVENS also dissented, arguing that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *id.*, at 537, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." *Id.*, at 541. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"—*i. e.*, such action should be subjected only to what we now call "intermediate scrutiny." 448 U. S., at 518–519.

In *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.*, at 273, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.*, at 274. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.'" *Id.*, at 285 (O'Connor, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.*, at 274, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.*, at 276, and insisted instead that "a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.*, at 277. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.*, at 295. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.*, at 301–302 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. See *United States* v. *Paradise*, 480 U. S., at 166 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 480 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e. g.*, *Kromnick* v. *School Dist. of Philadelphia*, 739 F. 2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U. S. 1107 (1985); *Williams* v. *New Orleans*, 729 F. 2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc.* v. *Metropolitan Dade County, Fla.*, 723 F. 2d 846, 851 (CA11), cert. denied, 469 U. S. 871 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493–494 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and White and KENNEDY, JJ.); *id.*, at 520 (SCALIA, J., concurring in judgment) ("I agree . . . with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.*, at 491–492, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,'" *id.*, at 500 (majority opinion) (quoting *Wygant*, *supra*, at 277 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U. S., at 508.

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment. *Id.*, at 491 (plurality opinion); see also *id.*, at 522 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* . . . , I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action when it vacated a decision upholding such action and remanded for further consideration in light of *Croson*. *H. K. Porter Co.* v. *Metropolitan Dade County,* 489 U. S. 1062 (1989); see also *Shurberg Broadcasting of Hartford, Inc.* v. *FCC,* 876 F. 2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in *H. K. Porter Co.*), rev'd *sub nom. Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e. g., Mann* v. *Albany,* 883 F. 2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg,* 876 F. 2d, at 910 (noting the difficulty of extracting general principles from the Court's fractured opinions); *id.,* at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc.* v. *FCC,* 873 F. 2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting, supra.*

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" *Wygant,* 476 U. S., at 273 (plurality opinion of Powell, J.); *Fullilove,* 448 U. S., at 491 (opinion of Burger, C. J.); see also *id.,* at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin,* 379 U. S., at 192 ("[R]acial classifications [are] 'constitutionally suspect'"); *Hirabayashi,* 320 U. S., at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*, 488 U. S., at 494 (plurality opinion); *id.*, at 520 (SCALIA, J., concurring in judgment); see also *Bakke*, 438 U. S., at 289–290 (opinion of Powell, J.), *i. e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley* v. *Valeo*, 424 U. S., at 93; see also *Weinberger* v. *Wiesenfeld*, 420 U. S., at 638, n. 2; *Bolling* v. *Sharpe*, 347 U. S., at 500. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *[Korematsu]*, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling

> governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer*, 334 U. S. [1, 22 (1948)]." *Bakke*, *supra*, at 299 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc.* v. *FCC*, *supra*, involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission (FCC). In *Metro Broadcasting*, the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling*, *supra*, at 500. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said, "—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives." *Metro Broadcasting*, 497 U. S., at 564–565 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Id.*, at 564, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.*, at 566. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *id.*, at 566–567, and that they were "substantially related" to that objective, *id.*, at 569. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson's* explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra,* at 493 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra,* at 298 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L. J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra*, at 223–224. Under *Metro Broadcasting*, certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited," *Hirabayashi*, 320 U. S., at 100—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.*, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, JUSTICE STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications," *post*, at 242. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

JUSTICE STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Post,* at 246. What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See *supra,* at 226. And JUSTICE STEVENS concedes that "some cases may be difficult to classify," *post,* at 245, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," *post,* at 245; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove,* 448 U. S., at 534 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

JUSTICE STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." *Post,* at 245. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And JUSTICE STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute." *Fullilove*, 448 U. S., at 545 (dissenting opinion) (emphasis added; footnote omitted); see also *id.*, at 537 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson*, 488 U. S., at 516–517 (STEVENS, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *supra*, at 226; but cf. *post*, at 245–246 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads JUSTICE STEVENS to dissent. According to JUSTICE STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," *post*, at 246, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat," *post*, at 243, 245. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson,* see 488 U. S., at 493–494 (plurality opinion); *id.,* at 520–521 (SCALIA, J., concurring in judgment); see also *Shaw* v. *Reno,* 509 U. S. 630, 643 (1993); *Powers* v. *Ohio,* 499 U. S. 400, 410 (1991). JUSTICE STEVENS does not explain how his views square with *Croson,* or with the long line of cases understanding equal protection as a personal right.

JUSTICE STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority §5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e. g., Metro Broadcasting,* 497 U. S., at 605–606 (O'CONNOR, J., dissenting); *Croson,* 488 U. S., at 486–493 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and White, J.); *id.,* at 518–519 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 521–524 (SCALIA, J., concurring in judgment); *Fullilove,* 448 U. S., at 472–473 (opinion of Burger,

C. J.); *id.*, at 500–502, and nn. 2–3, 515, and n. 14 (Powell, J., concurring); *id.*, at 526–527 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that JUSTICE STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post*, at 249–253, 256–257, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years, see *supra*, at 213–225. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering:* We cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, *e. g.*, Fried, *Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality, 104 Harv. L. Rev. 107, 113–117 (1990) (arguing that *Metro Broadcasting*'s adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight, 69 Texas L. Rev. 125, 145–146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC:* The Solution Almost Nobody Wanted, 59 UMKC L. Rev. 293, 297, 316–317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J. A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission,* 17 T. Marshall L. Rev. 317, 319, 354–355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States* v. *Dixon,* 509 U. S. 688 (1993), we overruled the recent case of *Grady* v. *Corbin,* 495 U. S. 508 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon, supra,* at 704, 712. In *Solorio* v. *United States,* 483 U. S. 435 (1987), we overruled *O'Callahan* v. *Parker,* 395 U. S. 258 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." *So-*

Iorio, *supra*, at 439–441, 450–451. And in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), we overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T. V.*, *supra*, at 47–48, 58. See also, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 830 (1991) (overruling *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989)); *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 695–701 (1978) (partially overruling *Monroe* v. *Pape*, 365 U. S. 167 (1961), because *Monroe* was a "departure from prior practice" that had not engendered substantial reliance); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965) (overruling *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.*, at 854. In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.*, at 856 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow

Metro Broadcasting, then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 272 (1995) (declining to overrule *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the 10 years since *Southland* was decided).

JUSTICE STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis*. But again, he misunderstands our position. We have acknowledged that, after *Croson*, "some uncertainty persisted with respect to the standard of review for federal racial classifications," *supra*, at 223, and we therefore do not say that we "merely restor[e] the *status quo ante*" today, *post*, at 257. But as we have described *supra*, at 213–227, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting*, and we therefore disagree with JUSTICE STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," *post*, at 257. We also disagree with JUSTICE STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument, see *post*, at 258–259, and n. 13. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Fullilove*, 448 U. S., at 523, and n. 1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.*, at 524. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition, *post*, at 259. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley*, *Loving*, *McLaughlin*, *Bolling*, *Hirabayashi*, and *Korematsu*, see *Fullilove*, *supra*, at 524–526, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." *Helvering*, 309 U. S., at 122. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove*, 448 U. S., at 496 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt . . . the formulas of analysis articulated in such cases as *[Bakke]*." *Id.*, at 492 (opinion of Burger, C. J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e. g., post,* at 247 (STEVENS, J., dissenting); *Croson,* 488 U. S., at 514–515, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting,* 497 U. S., at 610 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with JUSTICE STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove, supra,* at 533–535, 537 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu,* 323 U. S., at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub. L. 100–383, § 2(a), 102 Stat. 903–904 ("[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove, supra,* at 519 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States* v. *Paradise,* 480 U. S., at 167 (plurality opinion of Brennan, J.); *id.,* at 190 (STEVENS, J., concurring in judgment); *id.,* at 196 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

IV

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove,* analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F. 3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, *Croson, supra,* at 507, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove, supra,* at 513 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra.* We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged,*" 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III–C, and except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 520 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State . . . deny *to any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying JUSTICE STEVENS' and JUSTICE GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post,* at 243 (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression," *post*, at 243 (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid.* But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, JUSTICE STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 545 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.* In each instance, it is racial discrimination, plain and simple.

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*It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," *post*, at 275 (GINSBURG, J., dissenting); see also *post*, at 247 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on "'whose ox is gored,'" *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 295, n. 35 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See *ante*, at 223–224. I shall comment on each of these propositions, then add a few words about *stare decisis,* and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." *Fullilove* v. *Klutznick*, 448 U. S. 448, 533–535 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, *id.*, at 480; in Justice Powell's concurrence, *id.*, at 496; and in my dissent in *Fullilove, id.*, at 533–534. I welcome its renewed endorsement by the Court today. But, as the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976), should ignore this distinction.[1]

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[1] As JUSTICE GINSBURG observes, *post*, at 275–276, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate "'relevant differences,'" *ante*, at 228; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See *Missouri* v. *Jenkins*, *ante*, at 112 (O'CONNOR, J., concurring) ("[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice . . . . It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will

To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), and *Korematsu* v. *United States,* 323 U. S. 214 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens—a curfew and exclusion from certain areas on the West Coast[2]—on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. Cf. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834[3]

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skew the analysis and place well-crafted benign programs at unnecessary risk.

[2] These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in *Hirabayashi* and *Korematsu.* See *Korematsu,* 323 U. S., at 223 ("Regardless of the true nature of the assembly and relocation centers . . . we are dealing specifically with nothing but an exclusion order").

[3] See *Morton* v. *Mancari,* 417 U. S. 535, 541 (1974). To be eligible for the preference in 1974, an individual had to " 'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' " *Id.,* at 553, n. 24, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classi-

as comparable to the official discrimination against African-Americans that was prevalent for much of our history.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. *Ante*, at 225–226. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases may be difficult to classify,[4] but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a

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fication was not "racial" because it did not encompass all Native Americans. 417 U. S., at 553–554. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.*, at 551–552. In this case respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

[4] For example, in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. *Feeney,* 442 U. S., at 279.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." *Washington* v. *Davis,* 426 U. S. 229 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see *id.,* at 253–254 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 451–455 (1985) (STEVENS, J., concurring); *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 98–110 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See *Associated General Contractors of Cal., Inc.* v. *San Francisco,* 813 F. 2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.[5] Indeed, as I have previously argued, the former is virtually always repugnant to the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 316–317 (1986) (STEVENS, J., dissenting).[6]

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[5] In his concurrence, JUSTICE THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. *Ante,* at 240–241. Although I agree that this cost may be more significant than many people realize, see *Fullilove* v. *Klutznick,* 448 U. S. 448, 545 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the prefer-

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ences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find JUSTICE THOMAS' extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, *ante*, at 240—at all persuasive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots.

Finally, although JUSTICE THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see *Washington* v. *Davis*, 426 U. S. 229 (1976), but not without a strong element of common sense, see *id.*, at 252–256 (STEVENS, J., concurring); *id.*, at 256–270 (Brennan, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See *Fullilove*, 448 U. S., at 521 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism," *ante*, at 240 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

[6] As I noted in *Wygant*:

"There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision

By insisting on a doctrinaire notion of "consistency" in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today's majority. Thus, in *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990), in which we upheld a federal program designed to foster racial diversity in broadcasting, we identified the special "institu-

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to *include* more members of the minority in a school faculty for that reason.

"The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' *Cleburne* v. *Cleburne Living Center,* 473 U. S. 432, 452 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality." 476 U. S., at 316–317 (dissenting opinion).

tional competence" of our National Legislature. *Id.*, at 563. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." *Ibid.* We recalled the several opinions in *Fullilove* that admonished this Court to "'approach our task with appropriate deference to the Congress, a coequal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [*Fullilove*, 448 U. S.], at 472; see also *id.*, at 491; *id.*, at 510, and 515–516, n. 14 (Powell, J., concurring); *id.*, at 517–520 (MARSHALL, J., concurring in judgment)." 497 U. S., at 563. We recalled that the opinions of Chief Justice Burger and Justice Powell in *Fullilove* had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." 497 U. S., at 563 (citations and footnote omitted).

The majority in *Metro Broadcasting* and the plurality in *Fullilove* were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 520–524 (1989), JUSTICE SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1." *Id.*, at 521–522. Continuing, JUSTICE SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the

Civil War Amendments, but upon social reality and governmental theory." *Id.*, at 522.

> "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:
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> "'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961)." *Id.*, at 523 (opinion concurring in judgment).

In her plurality opinion in *Croson*, JUSTICE O'CONNOR also emphasized the importance of this distinction when she responded to the city's argument that *Fullilove* was controlling. She wrote:

> "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U. S., at 490 (joined by REHNQUIST, C. J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 767–768, n. 2 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See *ante*, at 230–231. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature.[7] The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.[8]

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[7] Despite the majority's reliance on *Korematsu* v. *United States*, 323 U. S. 214 (1944), *ante*, at 214–215, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." 323 U. S., at 216, quoted *ante*, at 214 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority.

[8] We have rejected this proposition outside of the affirmative-action context as well. In *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976), we held:

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley* v. *Valeo*, 424 U. S. 1, 93 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify

Our opinion in *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U. S., at 563. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in *Fullilove,* with respect to the States themselves.[9] When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment.[10] That section reads:

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selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

[9] The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA § 106(c)(4), 101 Stat. 146.

In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' § 5 authority even if the federal contracts are not. See *Metro Broadcasting,* 497 U. S., at 603–604 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

[10] Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's application to pure federal regulation of individuals.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.[11] This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it were more important than our actual holdings. In my opinion that treatment is incorrect.

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[11] We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). In *Katzenbach*, this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. *Id.*, at 648–651. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove* v. *Klutznick*, 448 U. S. 448, and the second in 1990, *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), *ante*, at 227, and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question, *ante*, at 235. By way of explanation, JUSTICE O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." *Ante*, at 234. A skeptical observer might ask whether this pronouncement is a faithful application of the doctrine of *stare decisis*.[12] A brief comment on each of the two ailing cases may provide the answer.

In the Court's view, our decision in *Metro Broadcasting* was inconsistent with the rule announced in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). *Ante*, at 225–226. But two decisive distinctions separate those two cases. First, *Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove*, which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today's majority trumpeted the importance of that distinction in *Croson*, they now reject it in the name of "congruence." It is therefore quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante*, for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

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[12] Our skeptical observer might also notice that JUSTICE O'CONNOR's explanation for departing from settled precedent is joined only by JUSTICE KENNEDY. *Ante*, at 204. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis*.

Second, *Metro Broadcasting*'s holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 311–319 (1978). Later, in *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.*, at 314–315 (STEVENS, J., dissenting); in response, JUSTICE O'CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.*, at 288, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. *Ante,* at 227. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting.*

The Court's suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, *ante,* at 235, is even more disingenuous than its treatment of *Metro Broadcasting.* For the Court endorses the "strict scrutiny" standard that Justice Powell applied in *Bakke,* see *ante,* at 224, and acknowledges that he applied that standard in *Fullilove* as well, *ante,* at 218–219. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke,* which of course included Justice Powell's. 448 U. S., at 492. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case's continued vitality and accuses it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.,* at 532–554 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, *id.,* at 522–532, contained any suggestion that the issue the Court was resolving had been decided before.[13] As was true of *Metro Broadcasting,* the Court in *Fullilove* decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

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[13] Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See *ante,* at 234–235, citing 448 U. S., at 523–526. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before *Fullilove.* The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the

V

The Court's holding in *Fullilove* surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in *Fullilove,* is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U. S. C. § 631 *et seq.*, and STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE's significantly less objectionable than the 1977 categorical grant of $400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." *Fullilove,* 448 U. S., at 532 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,[14] gives rise to a second rebuttable presumption

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next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

[14] STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR § 124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, *id.*, § 124.106. Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or

of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995); 48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., Apps. A and C (1994). Thus, the current preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see *Fullilove*, 448 U. S., at 537–538, 540, 543–544, and n. 16, 546 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.[15] 13 CFR § 124.106(a)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice—along with its lingering effects—still survives.[16] The presumption of economic disadvantage

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must be shown. See 15 U. S. C. § 637(d)(3) (1988 ed. and Supp. V); 13 CFR § 124.601 (1995).

[15] The Government apparently takes this exclusion seriously. See *Autek Systems Corp.* v. *United States*, 835 F. Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under § 8(a) program), aff'd, 43 F. 3d 712 (CADC 1994).

[16] "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Ante*, at 237.

"Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong. Rec. 34097 (1978) embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted. 13 CFR §§ 124.601–124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE's, 15 U. S. C. §§637(a)(B)–(C) (1988 ed., Supp. V); 13 CFR §124.602(a) (1995),[17] and DBE status can be challenged by a competitor at any time under any of the routes to certification. 13 CFR §124.603 (1995); 49 CFR §23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR §124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement—numerical or otherwise—that a general contractor must hire DBE subcontractors. The program we upheld in *Fullilove* required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. *Bakke*, 438 U. S., at 319–320 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

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[17] The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of §8(d) certification, although such review may be derivative for those businesses that receive §8(d) certification as a result of §8(a) or STURAA certification.

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see *Fullilove*, 448 U. S., at 549–550 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.[18] However we might

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[18] Respondents point us to the following legislative history:

H. R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H. R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U. S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women-Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs—Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988);

evaluate the benefits and costs—both fiscal and social—of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove.* If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution—a vision the Court expressly endorses today—it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of

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Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9–10, n. 9.

discrimination, as under *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), sufficient to justify surpassing the congressional objective. See 16 F. 3d 1537, 1544 (CA10 1994) ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240, 242 (Colo. 1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson*"); cf. Complaint ¶ 28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), is applied, and petitioner did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE's) on the basis of certain race-based presumptions. See generally *ante*, at 206–208. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing remedies for the continuing effects of past discrimination, see, *e. g., Fullilove, supra,* at 465–466 (citing legislative history describing SBA § 8(a) as remedial); S. Rep. No. 100–4, p. 11 (1987) (Committee Report stating that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite. See, *e. g.,* 16 F. 3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act . . . satisfies the evidentiary requirements of *Fullilove*"); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90–C–1413 (D. Colo.), p. 12 (*Fullilove* is not applicable to the case at bar because "[f]irst and foremost, *Fullilove* stands for only one proposition relevant here: the ability of the U. S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy").

In these circumstances, I agree with JUSTICE STEVENS's conclusion that *stare decisis* compels the application of *Fullilove.* Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.[1] *Fullilove,* 448 U. S., at 477–478 (opinion of Burger,

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[1] If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as JUSTICE STEVENS has noted, see *ante,* at 247–248, n. 5, 248–249, n. 6, it is

C. J.); *id.*, at 503 (Powell, J., concurring); *id.*, at 520–521 (Marshall, J., concurring in judgment). Once *Fullilove* is applied, as JUSTICE STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in *Fullilove*, see *ante*, at 259–264 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

The Court today, however, does not reach the application of *Fullilove* to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the *Fullilove* plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered *Fullilove*'s conclusion obsolete as judged under the *Fullilove* plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what *Fullilove* would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in *Fullilove* was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, *Metro Broadcasting, Inc.* v.

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not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

FCC, 497 U. S. 547, 564 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. *Fullilove, supra,* at 495–496 (concurring opinion) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 451 (1985) (STEVENS, J., concurring, joined by Burger, C. J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante,* at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' *Fullilove, supra,* at 519 (Marshall, J., concurring in judgment)"); see also *Missouri* v. *Jenkins, ante,* at 112 (O'CONNOR, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact' ").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. The Court simply notes the observation in *Croson* "that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson*'s facts did not implicate Congress's broad power under § 5 of the Fourteenth Amendment," *ante,* at 222, and explains that there is disagreement among today's majority about the extent of the §5 power, *ante,* at 230–231. There is therefore no reason to treat the opinion as affecting one way or another the views of §5 power, described as "broad," *ante,* at 269, "unique," *Fullilove,* 448 U. S., at 500 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," *Croson,* 488 U. S., at 490 (opinion of O'CONNOR, J.). See also *Jenkins, ante,* at 113 (O'CONNOR, J., concurring) ("Congress . . . enjoys '"discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"' *Croson,* 488 U. S., at 490 (quoting *Katzenbach* v. *Morgan,* 384 U. S., at 651)"). Thus, today's decision should leave §5 exactly where it is as the source of an interest of the National Government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily have any effect on the resolution of an issue that was just as pertinent under *Fullilove's* unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'"), quoting *Louisiana* v. *United States,* 380 U. S. 145, 154 (1965). This is so whether the remedial authority is exercised by a court, see *ibid.*; *Green* v. *School Bd. of New Kent Cty.,* 391 U. S. 430, 437 (1968), the Congress, see *Fullilove, supra,* at 502 (Powell, J., concurring), or some other legislature, see *Croson, supra,* at 491–492 (opinion of O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, *e. g.*, *ante*, at 228–229, 237 (opinion of O'CONNOR, J.); *ante*, at 243 (STEVENS, J., with whom GINSBURG, J., joins, dissenting); *post*, at 273, 275–276 (GINSBURG, J., with whom BREYER, J., joins, dissenting); *Jenkins*, *ante*, at 112 (O'CONNOR, J., concurring) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catchup mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in *Fullilove* that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U. S., at 513; *ante*, at 237–238 (opinion of the Court).

Surely the transition from the *Fullilove* plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand had chosen to press a challenge to the reasonableness of the burden of these statutes,[2] more than a decade after *Fullilove* had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

For the reasons stated by JUSTICE SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with JUSTICE STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." *Ante*, at 253 (STEVENS, J., dissenting); see *ante*, at 254–255.[1] I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.

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[2] I say "press a challenge" because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

[1] On congressional authority to enforce the equal protection principle, see, *e. g., Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 286 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under § 5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.*, at 291, 293 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity"; "Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147–151 (12th ed. 1991).

I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Ante*, at 237 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," *ante*, at 239 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id.*, at 559 (dissenting opinion).

Not until *Loving* v. *Virginia*, 388 U. S. 1 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.*, at 11.[2]

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[2] The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in *Loving*. See *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, vacated and remanded, 350 U. S. 891 (1955), reinstated and aff'd, 197 Va. 734, 90 S. E. 2d 849, appeal dism'd, 350 U. S. 985 (1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. *Ante,* at 237 (lead opinion); see also *ante,* at 269–270 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race.[3] White and African-American consumers still encounter different deals.[4] People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.[5]

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mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S. E. 2d, at 756.

[3] See, *e. g.,* H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90–4, 1990) (*e. g.,* Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91–9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

[4] See, *e. g.,* Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817, 821–822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

[5] See, *e. g.,* A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds. 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly

Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[8]

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discriminatory responses."); M. Turner, R. Struyk, & J. Yinger, U. S. Dept. of Housing and Urban Development, Housing Discrimination Study: Synthesis i–vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African-American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am. J. Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

[6] See, *e. g., Associated General Contractors* v. *Coalition for Economic Equity,* 950 F. 2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

[7] Cf. *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 318 (1986) (STEVENS, J., dissenting); *Califano* v. *Goldfarb,* 430 U. S. 199, 222–223 (1977) (STEVENS, J., concurring in judgment).

[8] On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, *e. g.,* Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

II

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. *Ante*, at 235–237. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu* v. *United States*, 323 U. S. 214 (1944); for in that case, scrutiny the Court described as "most rigid," *id.*, at 216, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante*, at 214–215 (lead opinion). A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," *ante*, at 239 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is " 'fatal in fact.' " *Ante*, at 237 (quoting *Fullilove* v. *Klutznick*, 448 U. S. 448, 519 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante*, at 228–229 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e. g.*, *Hoyt* v. *Florida*, 368 U. S. 57, 60 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking," *ante,* at 228 (lead opinion), "to 'differentiate between' permissible and impermissible governmental use of race," *ibid.,* to distinguish "'between a "No Trespassing" sign and a welcome mat,'" *ante,* at 229.

Close review also is in order for this further reason. As JUSTICE SOUTER points out, *ante,* at 270 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e. g., Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n,* 482 F. 2d 1333, 1341 (CA2 1973).

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While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

WILTON ET AL. *v.* SEVEN FALLS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94–562. Argued March 27, 1995—Decided June 12, 1995

Petitioner underwriters refused to defend or indemnify respondents under several commercial liability insurance policies in litigation between respondents and other parties over the ownership and operation of certain Texas oil and gas properties. After a verdict was entered against respondents and they notified petitioners that they intended to file a state court suit on the policies, petitioners sought a declaratory judgment in federal court that their policies did not cover respondents' liability. Respondents filed their state court suit and moved to dismiss or, in the alternative, to stay petitioners' action. The District Court entered a stay on the ground that the state suit encompassed the same coverage issues raised in the federal action, and the Court of Appeals affirmed. Noting that a district court has broad discretion to grant or decline to grant declaratory judgment, the court did not require application of the test articulated in *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, and *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, under which district courts must point to "exceptional circumstances" to justify staying or dismissing federal proceedings. The court reviewed the District Court's decision for abuse of discretion, and found none.

Held:

1. The discretionary standard of *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, governs a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings. Pp. 282–288.

(a) In addressing circumstances virtually identical to those present here, the Court in *Brillhart* made clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act (Act), even when the suit otherwise satisfies subject matter jurisdiction. While *Brillhart* did not set out an exclusive list of factors governing the exercise of this discretion, it did provide some guidance, indicating that, at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in gratuitous interference if it permitted the federal declaratory action to proceed. Pp. 282–283.

(b) The Act's distinct features justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the "exceptional circumstances" test set forth in *Colorado River* and *Moses H. Cone*, neither of which dealt with declaratory judgments. On its face, the Act makes a textual commitment to discretion by specifying that a court "*may*" declare litigants' rights, 28 U. S. C. § 2201(a) (emphasis added), and it has repeatedly been characterized as an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant. Pp. 283–287.

(c) Petitioners' argument that, despite the unique breadth of this discretion, district courts lack discretion to decline to hear a declaratory judgment suit at the outset depends on the untenable proposition that a court, knowing at the litigation's commencement that it will exercise its discretion to decline declaratory relief, must nonetheless go through the futile exercise of hearing a case on the merits first. Nothing in the Act recommends this reading, and the Court is unwilling to impute to Congress an intention to require such a wasteful expenditure of judicial resources. Pp. 287–288.

2. District courts' decisions about the propriety of hearing declaratory judgment actions should be reviewed for abuse of discretion, not *de novo*. It is more consistent with the Act to vest district courts with discretion in the first instance, because facts bearing on the declaratory judgment remedy's usefulness, and the case's fitness for resolution, are particularly within their grasp. Proper application of the abuse of discretion standard on appeal can provide appropriate guidance to district courts. Pp. 288–289.

3. The District Court acted within its bounds in staying the declaratory relief action in this case, since parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court. Pp. 289–290.

41 F. 3d 934, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except BREYER, J., who took no part in the consideration or decision of the case.

Michael A. Orlando argued the cause for petitioners. With him on the briefs were *Patrick C. Appel* and *Paul LeRoy Crist*.

Werner A. Powers argued the cause for respondents. With him on the brief was *Charles C. Keeble, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case asks whether the discretionary standard set forth in *Brillhart* v. *Excess Ins. Co. of America,* 316 U. S. 491 (1942), or the "exceptional circumstances" test developed in *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800 (1976), and *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.,* 460 U. S. 1 (1983), governs a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings, and under what standard of review a court of appeals should evaluate the district court's decision to do so.

I

In early 1992, a dispute between respondents (the Hill Group) and other parties over the ownership and operation of oil and gas properties in Winkler County, Texas, appeared likely to culminate in litigation. The Hill Group asked petitioners (London Underwriters)[1] to provide them with coverage under several commercial liability insurance policies. London Underwriters refused to defend or indemnify the Hill Group in a letter dated July 31, 1992. In September 1992, after a 3-week trial, a Winkler County jury entered a verdict in excess of $100 million against the Hill Group on various state law claims.

The Hill Group gave London Underwriters notice of the verdict in late November 1992. On December 9, 1992, London Underwriters filed suit in the United States District Court for the Southern District of Texas, basing jurisdiction upon diversity of citizenship under 28 U. S. C. § 1332. London Underwriters sought a declaration under the Declaratory Judgment Act, 28 U. S. C. § 2201(a) (1988 ed., Supp. V), that their policies did not cover the Hill Group's liability for the Winkler County judgment. After negotiations with the Hill Group's counsel, London Underwriters voluntarily dismissed the action on January 22, 1993. London Underwriters did so, however, upon the express condition that the Hill Group give London Underwriters two weeks' notice if they decided to bring suit on the policy.

**Laura A. Foggan, Daniel E. Troy,* and *Thomas W. Brunner* filed a brief for the Insurance Environmental Litigation Association as *amicus curiae* urging reversal.

Edward F. LeBreton III filed a brief for the Maritime Law Association as *amicus curiae.*

[1] For the sake of clarity, we adopt the Court of Appeals' manner of referencing the parties.

On February 23, 1993, the Hill Group notified London Underwriters of their intention to file such a suit in Travis County, Texas. London Underwriters refiled their declaratory judgment action in the Southern District of Texas on February 24, 1993. As promised, the Hill Group initiated an action against London Underwriters on March 26, 1993, in state court in Travis County. The Hill Group's codefendants in the Winkler County litigation joined in this suit and asserted claims against certain Texas insurers, thus rendering the parties nondiverse and the suit nonremovable.

On the same day that the Hill Group filed their Travis County action, they moved to dismiss or, in the alternative, to stay London Underwriters' federal declaratory judgment action. After receiving submissions from the parties on the issue, the District Court entered a stay on June 30, 1993. The District Court observed that the state lawsuit pending in Travis County encompassed the same coverage issues raised in the declaratory judgment action and determined that a stay was warranted in order to avoid piecemeal litigation and to bar London Underwriters' attempts at forum shopping. London Underwriters filed a timely appeal. See *Moses H. Cone Memorial Hospital, supra,* at 10 (a district court's order staying federal proceedings in favor of pending state litigation is a "final decisio[n]" appealable under 28 U. S. C. § 1291).

The United States Court of Appeals for the Fifth Circuit affirmed. 41 F. 3d 934 (1994). Noting that under Circuit precedent, "[a] district court has broad discretion to grant (or decline to grant) declaratory judgment," *id.*, at 935, citing *Torch, Inc.* v. *LeBlanc*, 947 F. 2d 193, 194 (CA5 1991), the Court of Appeals did not require application of the test articulated in *Colorado River, supra*, and *Moses H. Cone, supra*, under which district courts must point to "exceptional circumstances" to justify staying or dismissing federal proceedings. Citing the interests in avoiding duplicative proceedings and forum shopping, the Court of Appeals reviewed the District Court's decision for abuse of discretion, and found none. 41 F. 3d, at 935.

We granted certiorari, 513 U. S. 1013 (1994), to resolve Circuit conflicts concerning the standard governing a district court's decision to stay a declaratory judgment action in favor of parallel state litigation, compare, *e. g., Employers Ins. of Wausau* v. *Missouri Elec. Works*, 23 F. 3d 1372, 1374, n. 3 (CA8 1994) (pursuant to *Colorado River* and *Moses H. Cone*, a district court may not stay or dismiss a declaratory judgment action absent "exceptional circumstances"); *Lumbermens Mut. Casualty Co.* v. *Connecticut Bank & Trust*, 806 F. 2d 411, 413 (CA2 1986) (same), with *Travelers Ins. Co.* v. *Louisiana Farm Bureau Federation, Inc.*, 996 F. 2d 774, 778, n. 12 (CA5 1993) (the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone* is inapplicable in declaratory judgment actions); *Mitcheson* v. *Harris*, 955 F. 2d 235, 237–238 (CA4 1992) (same), and the applicable standard for an appellate court's review of a district court's decision to stay a declaratory judgment action, compare, *e. g., United States Fidelity & Guaranty Co.* v. *Murphy Oil USA, Inc.*, 21 F. 3d 259, 263, n. 5 (CA8 1994) (reviewing for abuse of discretion); *Christopher P.* v. *Marcus*, 915 F. 2d 794, 802 (CA2 1990) (same), with *Genentech, Inc.* v. *Eli Lilly & Co.*, 998

F. 2d 931, 936 (CA Fed. 1993) (reviewing *de novo*); *Cincinnati Ins. Co.* v. *Holbrook*, 867 F. 2d 1330, 1333 (CA11 1989) (same). We now affirm.

II

Over 50 years ago, in *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491 (1942), this Court addressed circumstances virtually identical to those present in the case before us today. An insurer, anticipating a coercive suit, sought a declaration in federal court of nonliability on an insurance policy. The District Court dismissed the action in favor of pending state garnishment proceedings, to which the insurer had been added as a defendant. The Court of Appeals reversed, finding an abuse of discretion, and ordered the District Court to proceed to the merits. Reversing the Court of Appeals and remanding to the District Court, this Court held that, "[a]lthough the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction." *Id.*, at 494. The Court explained that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Id.*, at 495. The question for a district court presented with a suit under the Declaratory Judgment Act, the Court found, is "whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court." *Ibid.*

Brillhart makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Although *Brillhart* did not set out an exclusive list of factors governing the district court's exercise of this discretion, it did provide some useful guidance in that regard.

The Court indicated, for example, that in deciding whether to enter a stay, a district court should examine "the scope of the pending state court proceeding and the nature of defenses open there." *Ibid.* This inquiry, in turn, entails consideration of "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." *Ibid.* Other cases, the Court noted, might shed light on additional factors governing a district court's decision to stay or to dismiss a declaratory judgment action at the outset. See *ibid.* But *Brillhart* indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in "[g]ratuitous interference," *ibid.*, if it permitted the federal declaratory action to proceed.

Brillhart, without more, clearly supports the District Court's decision in this case. (That the court here stayed, rather than dismissed, the action is of little moment in this regard, because the state court's decision will bind the parties under principles of res judicata.) Nonetheless, London Underwriters argue, and several Courts of Appeals have agreed, that intervening case law has supplanted *Brillhart*'s notions of broad discretion with a test under which district courts may stay or dismiss actions properly within their jurisdiction only in "exceptional circumstances." In London Underwriters' view, recent cases have established that a district court must point to a compelling reason—which, they say, is lacking here—in order to stay a declaratory judgment action in favor of pending state proceedings. To evaluate this argument, it is necessary to examine three cases handed down several decades after *Brillhart.*

In *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800 (1976), the Government brought an action in Federal District Court under 28 U. S. C. § 1345 seeking a declaration of its water rights, the appointment of a water master, and an order enjoining all uses and diversions of water by other parties. See Pet. for Cert. in *Colorado River Water Conservation Dist.* v. *United States,* O. T. 1974, No. 74–940, pp. 39a–40a. The District Court dismissed the action in deference to ongoing state proceedings. The Court of Appeals reversed, 504 F. 2d 115 (CA10 1974), on the ground that the District Court had jurisdiction over the Government's suit and that abstention was inappropriate. This Court reversed again. Without discussing *Brillhart,* the Court began with the premise that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress. *Colorado River, supra,* at 813, 817–818, citing *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821). The Court determined, however, that a district court could nonetheless abstain from the assumption of jurisdiction over a suit in "exceptional" circumstances, and it found such exceptional circumstances on the facts of the case. 424 U. S., at 818–820. Specifically, the Court deemed dispositive a clear federal policy against piecemeal adjudication of water rights; the existence of an elaborate state scheme for resolution of such claims; the absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss; the extensive nature of the suit; the 300-mile distance between the District Court and the situs of the water district at issue; and the prior participation of the Federal Government in related state proceedings.

Two years after *Colorado River* we decided *Will* v. *Calvert Fire Ins. Co.,* 437 U. S. 655 (1978), in which a plurality of the Court stated that, while "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,'" *id.,* at 662, quoting *McClellan* v. *Carland,* 217 U. S. 268, 282 (1910), a district court is "'under no compulsion to exercise that jurisdiction,'" 437 U. S., at 662, quoting *Brillhart,* 316

U. S., at 494. *Will* concerned an action seeking damages for an alleged violation of federal securities laws brought in federal court during the pendency of related state proceedings. Although the case arose outside the declaratory judgment context, the plurality invoked *Brillhart* as the appropriate authority. *Colorado River*, according to the plurality, "in no way undermine[d] the conclusion of *Brillhart* that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Will, supra,* at 664. Justice Blackmun, concurring in the judgment, criticized the plurality for not recognizing that *Colorado River* had undercut the "sweeping language" of *Brillhart.* 437 U. S., at 667. Four Justices in dissent urged that the *Colorado River* "exceptional circumstances" test supplied the governing standard.

The plurality's suggestion in *Will* that *Brillhart* might have application beyond the context of declaratory judgments was rejected by the Court in *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1 (1983). In *Moses H. Cone*, the Court established that the *Colorado River* "exceptional circumstances" test, rather than the more permissive *Brillhart* analysis, governs a district court's decision to stay a suit to compel arbitration under § 4 of the Arbitration Act in favor of pending state litigation. Noting that the combination of Justice Blackmun and the four dissenting Justices in *Will* had made five to require application of *Colorado River*, the Court rejected the argument that *Will* had worked any substantive changes in the law. "'Abdication of the obligation to decide cases,'" the Court reasoned, "'can be justified . . . only in the exceptional circumstance where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" 460 U. S., at 14, quoting *Colorado River, supra,* at 813. As it had in *Colorado River,* the Court articulated nonexclusive factors relevant to the existence of such exceptional circumstances, including the assumption by either court of jurisdiction over a res, the relative convenience of the fora, avoidance of piecemeal litigation, the order in which jurisdiction was obtained by the concurrent fora, whether and to what extent federal law provides the rules of decision on the merits, and the adequacy of state proceedings. Evaluating each of these factors, the Court concluded that the District Court's stay of federal proceedings was, under the circumstances, inappropriate.

Relying on these post-*Brillhart* developments, London Underwriters contend that the *Brillhart* regime, under which district courts have substantial latitude in deciding whether to stay or to dismiss a declaratory judgment suit in light of pending state proceedings (and need not point to "exceptional circumstances" to justify their actions), is an outmoded relic of another era. We disagree. Neither *Colorado River,* which upheld the dismissal of federal proceedings, nor *Moses H. Cone,* which did not, dealt with actions brought under the Declaratory Judgment Act, 28 U. S. C. § 2201(a) (1988 ed., Supp. V). Distinct features of the Declaratory Judgment Act, we believe, justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone.* No subsequent case, in our view, has called into question the application of the *Brillhart* standard to the *Brillhart* facts.

Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration," 28 U. S. C. § 2201(a) (1988 ed., Supp. V) (emphasis added). See generally E. Borchard, Declaratory Judgments 312–314 (2d ed. 1941); Borchard, Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments, 26 Minn. L. Rev. 677 (1942). The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface. See generally Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543 (1985); cf. O. Fiss & D. Rendleman, Injunctions 106–108 (2d ed. 1984) (describing courts' nonstatutory discretion, through application of open-ended substantive standards like "irreparable injury," in the injunction context). We have repeatedly characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952); see also *Green* v. *Mansour,* 474 U. S. 64, 72 (1985); *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U. S. 83, 95, n. 17 (1993). When all is said and done, we have concluded, "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff, supra,* at 243.

Acknowledging, as they must, the unique breadth of this discretion to decline to enter a declaratory judgment, London Underwriters nonetheless contend that, after *Colorado River* and *Moses H. Cone,* district courts lack discretion to decline to hear a declaratory judgment suit at the outset. See Brief for Petitioners 22 ("District courts *must* hear declaratory judgment cases absent exceptional circumstances; district courts *may* decline to enter the requested relief following a full trial on the merits, if no beneficial purpose is thereby served or if equity otherwise counsels"). We are not persuaded by this distinction. London Underwriters' argument depends on the untenable proposition that a district court, knowing at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory relief, must nonetheless go through the futile exercise of hearing a case on the merits first. Nothing in the language of the Declaratory Judgment Act recommends London Underwriters' reading, and we are unwilling to impute to Congress an intention to require such a wasteful expenditure of judicial resources. If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that court to proceed to the merits before staying or dismissing the action.

We agree, for all practical purposes, with Professor Borchard, who observed half a century ago that "[t]here is . . . nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court" to hear a declaratory judgment action. Borchard, Declaratory Judgments, at 313. By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close.[2] In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

III

As Judge Friendly observed, the Declaratory Judgment Act "does not speak," on its face, to the question whether discretion to entertain declaratory judgment actions is vested in district courts alone or in the entire judicial system. Friendly, Indiscretion about Discretion, 31 Emory L.

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[2] We note that where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy. See, *e. g.*, P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1451, n. 9 (3d ed. 1988).

J. 747, 778 (1982). The Court of Appeals reviewed the District Court's decision to stay London Underwriters' action for abuse of discretion, and found none. London Underwriters urge us to follow those other Courts of Appeals that review decisions to grant (or to refrain from granting) declaratory relief *de novo.* See, *e. g., Genentech, Inc.* v. *Eli Lilly & Co.,* 998 F. 2d, at 936; *Cincinnati Ins. Co.* v. *Holbrook,* 867 F. 2d, at 1333. We decline this invitation. We believe it more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. Cf. *First Options of Chicago, Inc.* v. *Kaplan,* 514 U. S. 938, 948 (1995) ("[T]he reviewing attitude that a court of appeals takes toward a district court decision should depend upon 'the respective institutional advantages of trial and appellate courts'") (citation omitted); *Miller* v. *Fenton,* 474 U. S. 104, 114 (1985) ("[T]he fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). While it may be true that sound administration of the Declaratory Judgment Act calls for the exercise of "judicial discretion, hardened by experience into rule," Borchard, Declaratory Judgments, at 293, proper application of the abuse of discretion standard on appellate review can, we think, provide appropriate guidance to district courts. In this regard, we reject London Underwriters' suggestion, Brief for Petitioners 14, that review for abuse of discretion "is tantamount to no review" at all.

IV

In sum, we conclude that *Brillhart* v. *Excess Ins. Co. of America,* 316 U. S. 491 (1942), governs this declaratory judgment action and that district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings. Like the Court of Appeals, we conclude only that the District Court acted within its bounds in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court. The judgment of the Court of Appeals for the Fifth Circuit is

Affirmed.

JUSTICE BREYER took no part in the consideration or decision of this case.

METROPOLITAN STEVEDORE CO. *v.* RAMBO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–820. Argued April 25, 1995—Decided June 12, 1995

Respondent Rambo received a disability award under the Longshore and Harbor Workers' Compensation Act (LHWCA) for an injury he sustained while working for petitioner as a longshore frontman. Subsequently, he acquired new skills and obtained longshore work as a crane operator, earning more than three times his preinjury earnings, though his physical condition remained unchanged. Petitioner filed an application to modify the disability award under LHWCA § 22 on the ground that there had been a "change in conditions" so that Rambo was no longer disabled. An Administrative Law Judge terminated the disability payments, and the Benefits Review Board affirmed, relying on its 1984 *Fleetwood* decision that a change in wage-earning capacity is a change in conditions under § 22. The Court of Appeals reversed, holding that § 22 authorizes modification only where there has been a change in an employee's physical condition.

Held: A disability award may be modified under § 22 where there is a change in an employee's wage-earning capacity, even without any change in the employee's physical condition. Pp. 294–303.

(a) A narrow reading of the phrase "change in conditions" is not supported by the Act's language, structure, and purpose. Section 22's use of the plural "conditions" suggests that Congress did not intend to limit the bases for modifying awards to a single condition, such as an employee's physical health. Rather, under the normal or natural reading, the applicable "conditions" are those that entitled the employee to benefits in the first place, the same conditions on which continuing entitlement is predicated. This interpretation is confirmed by the language of LHWCA §§ 2(10) and 8(c)(21), which make it clear that compensation, as an initial matter, is predicated on loss of wage-earning capacity and should continue only while the incapacity to earn wages persists. Thus, disability is in essence an economic, not a medical, concept. The Act's fundamental purpose is to compensate employees for wage-earning capacity lost because of injury; where that capacity has been reduced, restored, or improved, the basis for compensation changes and modification is permitted. Pp. 294–298.

(b) The legislative history also does not support a narrow construction of § 22. Congress' decision to maintain a 1-year limitations period in which to seek modification does not indicate a congressional intent to limit other parts of § 22. Nor is there any evidence that when Congress reenacted the phrase "change in conditions" as late as 1984, it was endorsing prior Court of Appeals' decisions limiting the phrase to changes in physical conditions. In addition, the dicta in those cases that Rambo claims is swept away by the Court's reading of § 22 is neither authoritative nor persuasive. Finally, experience in the 11 years since *Fleetwood* does not suggest that the Office of Workers Compensation Programs (OWCP) and courts will be flooded with litigation arising from modification requests based on every change in an employee's wages. Such an argument is better directed at Congress or the OWCP Director than at the courts; and it is based on a misconception of the LHWCA and the instant holding, for a change in wage-earning capacity will occur with a change in actual wages only when those wages fairly and reasonably represent such capacity. Pp. 298–303.

28 F. 3d 86, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 301.

Robert Evans Babcock argued the cause and filed briefs for petitioner.

Jeffrey P. Minear argued the cause for the federal respondent in support of petitioner under this Court's Rule 12.4. With him on the briefs were *Solicitor General Days, Deputy Solicitor General Kneedler, Allen H. Feldman, Nathaniel I. Spiller,* and *Edward D. Sieger.*

Thomas J. Pierry argued the cause and filed a brief for respondent Rambo.*

JUSTICE KENNEDY delivered the opinion of the Court.

Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1437, as amended, 33 U. S. C. § 922, allows for modification of a disability award

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*Briefs of *amici curiae* urging reversal were filed for Industrial Indemnity Insurance Co. by *Roger A. Levy;* and for the National Association of Waterfront Employers et al. by *Charles T. Carroll, Jr., Thomas D. Wilcox,* and *Franklin W. Losey.*

"on the ground of a change in conditions or because of a mistake in a determination of fact." The question in this case is whether a party may seek modification on the ground of "change in conditions" when there has been no change in the employee's physical condition but rather an increase in the employee's wage-earning capacity due to the acquisition of new skills.

I

In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge (ALJ). After Rambo and petitioner stipulated that Rambo sustained a 22½% permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA § 8(c)(21), awarded Rambo 66⅔% of that figure, or $80.16 per week. App. 5. Because the ALJ also found that Rambo's disability was not due solely to his work-related injury and was "materially and substantially greater than that which would have resulted from the subsequent injury alone," LHWCA § 8(f)(1), 33 U. S. C. § 908(f)(1), he limited the period of petitioner's liability to pay compensation to 104 weeks. *Ibid.;* App. 6. Later payments were to issue from the special fund administered by respondent Director of the Office of Workers' Compensation Programs (OWCP), LHWCA § 8(f)(2), 33 U. S. C. § 908(f)(2). Employers (or their insurance carriers) contribute to the fund based on their outstanding liabilities. See LHWCA § 44(c)(2)(B), 33 U. S. C. § 944(c)(2)(B).

After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his preinjury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner, which may seek modification even when the special fund has assumed responsibility for payments, see LHWCA § 22, 33 U. S. C. § 922; 20 CFR § 702.148(b) (1994), filed an application to modify the disability award under LHWCA § 22. Petitioner asserted there had been a "change in conditions" so that Rambo was no longer "disabled" under the Act. The ALJ agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage increases due to inflation and considering Rambo's risk of job loss and other employment prospects, the ALJ concluded Rambo "no longer has a wage-earning capacity loss" and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F. 2d 1225 (CA4 1985), which held that "change in condition[s]" means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo* v. *Director, OWCP,* 28 F. 3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood,* the Ninth Circuit held that LHWCA § 22 authorizes modification of an award only where there has been a change in the claimant's physical condition. We granted certiorari to resolve this split, 513 U. S. 1106 (1995), and now reverse.

II

The LHWCA is a comprehensive scheme to provide compensation "in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States." LHWCA § 3, 33 U. S. C. § 903(a). Section 22 of the Act provides for modification of awards "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U. S. C. § 922. In Rambo's view and that of the Ninth Circuit, "change in conditions" means change in physical condition and does not include changes in other conditions relevant to the initial entitlement to benefits, such as a change in wage-earning capacity. In our view, this interpretation of "change in conditions" cannot stand in the face of the language, structure, and purpose of the Act.

A

Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 475 (1992); *Demarest* v. *Manspeaker*, 498 U. S. 184, 190 (1991).

Section 22 of the Act provides the only way to modify an award once it has issued. The section states:

> "Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U. S. C. § 922.

On two occasions we have construed the phrase "mistake in a determination of fact" and observed that nothing in the statutory language supports attempts to limit it to particular kinds of factual errors or to cases involving new evidence or changed circumstances. See *O'Keeffe* v. *Aerojet-General*

Shipyards, Inc., 404 U. S. 254, 255–256 (1971) *(per curiam); Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 465 (1968). The language of § 22 also provides no support for Rambo's narrow construction of the phrase "change in conditions." The use of "conditions," a word in the plural, suggests that Congress did not intend to limit the bases for modifying awards to a single condition, such as an employee's physical health. See 2A N. Singer, Sutherland on Statutory Construction § 47.34, p. 274 (5th rev. ed. 1992) ("'Ordinarily the legislature by use of a plural term intends a reference to more than one matter or thing'") (quoting N. Y. Statutes Law § 252 (McKinney 1971)); cf. 1 U. S. C. § 1 ("[W]ords importing the plural include the singular"). Rather, under the "normal" or "natural reading," *Estate of Cowart, supra,* at 477, the applicable "conditions" are those that entitled the employee to benefits in the first place, the same conditions on which continuing entitlement is predicated.

Our interpretation is confirmed by the language of LHWCA §§ 2(10) and 8(c)(21). Section 2(10) defines "[d]isability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U. S. C. § 902(10). For certain injuries the statute creates a conclusive presumption of incapacity to earn wages and sets compensation at $66\frac{2}{3}\%$ of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. See LHWCA §§ 8(c)(1)–(20), (22), 33 U. S. C. §§ 908(c)(1)–20, (22). When these types of scheduled injuries occur, a claimant simply proves the relevant physical injury and compensation follows for a finite period of time. See *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs,* 506 U. S. 153, 156, n. 4 (1993); *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs,* 449 U. S. 268, 269 (1980). "In all other cases," however, the statute provides "the compensation shall be $66\frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." LHWCA § 8(c)(21), 33 U. S. C. § 908(c)(21). For these nonscheduled injuries, the type at issue in this case, loss of wage-earning capacity is an element of the claimant's case, for without the statutory presumption that accompanies scheduled injuries, a claimant is not "disabled" unless he proves "incapacity because of injury to earn the wages." LHWCA § 2(10), 33 U. S. C. § 902(10). See *Bath Iron Works, supra,* at 156; *Potomac Elec. Power Co., supra,* at 269–270. These two sections make it clear that compensation, as an initial matter, is predicated on loss of wage-earning capacity, and that such compensation should continue only "during the continuance of partial disability," LHWCA § 8(c)(21), 33 U. S. C. § 908(c)(21), *i. e.,* during the continuance of the "incapacity . . . to earn the wages," LHWCA § 2(10), 33 U. S. C. § 902(10). Section 22 accommodates this statutory requirement by providing for modification of an award on the ground of "a change in conditions." 33 U. S. C. § 922.

Rambo's insistence on what seems to us a " 'narrowly technical and impractical construction' " of this phrase, *O'Keeffe, supra,* at 255 (quoting *Luckenbach S. S. Co.* v. *Norton,* 106 F. 2d 137, 138 (CA3 1939)), does more than disregard the plain language of §§ 22, 2(10), and 8(c)(21). It also is inconsistent with the structure and purpose of the LHWCA. Like most other workers' compensation schemes, the LHWCA does not compensate physical injury alone but the disability produced by that injury. See LHWCA §§ 3(a), 8, 33 U. S. C. §§ 903(a), 908; see also 1C A. Larson, Law of Workmen's Compensation § 57.11 (1994). Disability under the LHWCA, defined in terms of wage-earning capacity, LHWCA § 2(10), is in essence an economic, not a medical, concept. Cf. 3 Larson, *supra,* § 81.31(e), p. 15–1150 (1995) ("[D]isability in the compensation sense has an economic as well as a medical component"). It may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they "fairly and reasonably represent his wage-earning capacity," and if they do not, then with "due regard to the nature of [the employee's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." LHWCA § 8(h), 33 U. S. C. § 908(h). The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

B

Given that the language of § 22 and the structure of the Act itself leave little doubt as to Congress' intent, any argument based on legislative history is of minimal, if any, relevance. See *Connecticut Nat. Bank* v. *Germain,* 503 U. S. 249, 254, (1992); *Ardestani* v. *INS,* 502 U. S. 129, 136 (1991); cf. *Intercounty Constr. Corp.* v. *Walter,* 422 U. S. 1, 8 (1975) (construing ambiguity in application of § 22's 1-year limitations period). In any event, we find Rambo's arguments that the legislative history provides support for his view lacking in force.

From congressional Reports accompanying amendments to § 22 in 1934, 1938, and 1984, Reports suggesting Congress was unwilling to extend the 1-year limitations period in which a party may seek modification, Rambo would have us infer that Congress intended a narrow construction of other parts of § 22, including the circumstances that would justify reopening an award. We rejected this very argument in *Banks, supra,* at 465, and its logic continues to elude us. Congress' decision to maintain a 1-year limitations period has no apparent relevance to which changed conditions may justify modifying an award.

Rambo next contends that following *McCormick S. S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F. 2d 84 (CA9 1933), the Courts of Appeals unanimously held that "change in conditions" refers only to changes in physical conditions, so Congress' reenactment of the phrase "change in conditions" when it amended other parts of §22 as late as 1984 must be understood to endorse that approach. We have often relied on Congress' "reenact[ment of] statutory language that has been given a consistent judicial construction," *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 185 (1994); see *Pierce* v. *Underwood*, 487 U. S. 552, 566–567 (1988), in particular where Congress was aware of or made reference to that judicial construction, see *Brown* v. *Gardner*, 513 U. S. 115, 121 (1994); *United States* v. *Calamaro*, 354 U. S. 351, 359 (1957). The cases in the relevant period, however, were based on a misreading of *McCormick, supra*, which did not reject the idea that §22 included a change in wage-earning capacity, but merely expressed doubt that §22 "applies to a change in earnings due to economic conditions," 64 F. 2d, at 85; they involved dicta, not holdings, see, *e. g., Pillsbury* v. *Alaska Packers Assn.*, 85 F. 2d 758, 760 (CA9 1936), rev'd on other grounds, 301 U. S. 174 (1937); *Burley Welding Works, Inc.* v. *Lawson*, 141 F. 2d 964, 966 (CA5 1944); *General Dynamics Corp.* v. *Director, OWCP*, 673 F. 2d 23, 25, n. 6 (CA1 1982) *(per curiam);* and they were not uniform in their approach, see, *e. g., Hole* v. *Miami Shipyards Corp.*, 640 F. 2d 769, 772 (CA5 1981) ("[T]he compensation award may be modified years later to reflect . . . greater or lesser economic injury"). Under these circumstances, we are not persuaded that congressional silence in the reenactment of the phrase "change in conditions" carries any significance.

In a related argument, Rambo criticizes petitioner's reading of §22 because it sweeps away an accumulation of more than 50 years of dicta. Far from counseling hesitation, however, we think this step long overdue. "[A]ge is no antidote to clear inconsistency with a statute," *Brown* v. *Gardner*, *supra*, at 122, and the dictum of *Pillsbury* and *Burley Welding Works* has not even aged with integrity, see, *e. g.*, *Fleetwood* v. *Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984); *LaFaille* v. *Benefits Review Board, U. S. Dept. of Labor*, 884 F. 2d 54, 62 (CA2 1989); *Avondale Shipyards, Inc.* v. *Guidry*, 967 F. 2d 1039, 1042, n. 6 (CA5 1992) (dictum). Breath spent repeating dicta does not infuse it with life. The unnecessary observations of these Courts of Appeals "are neither authoritative nor persuasive." *McLaren* v. *Fleischer*, 256 U. S. 477, 482 (1921); cf. *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970).

Finally, Rambo argues that including a change in wage-earning capacity as a change in conditions under § 22 will flood the OWCP and the courts with litigation because parties will request modification every time an employee's wages change or the economy takes a turn in one direction or the other. Experience in the 11 years since the Benefits Review Board decided *Fleetwood, supra,* suggests otherwise, but that argument is, in any case, better directed at Congress or the Director in her rulemaking capacity, see LHWCA § 39(a), 33 U. S. C. § 939(a); *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 134 (1995), than at the courts. It is also based on a misconception of the LHWCA and our holding today. We recognize only that an award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity. A change in actual wages is controlling only when actual wages "fairly and reasonably represent . . . wage-earning capacity." LHWCA § 8(h), 33 U. S. C § 908(h). Otherwise, wage-earning capacity may be determined according to the many factors identified in § 8(h), including "any . . . factors or circumstances in the case which may affect [the employee's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." This circumspect approach does not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy. There may be cases raising difficult questions as to what constitutes a change in wage-earning capacity, but we need not address them here. Rambo acquired additional, marketable skills and the ALJ, recognizing that higher wages do not necessarily prove an increase in wage-earning capacity, took care to account for inflation and risk of job loss in evaluating Rambo's new "wage-earning capacity in an open labor market under normal employment conditions." App. 66.

We hold that a disability award may be modified under §22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. Because Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address, we reverse and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The statutory provision that the Court construes today was enacted in 1927. Although one 1985 case reached the result the Court adopts today, *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F. 2d 1225 (CA4), over 60 years of otherwise consistent precedent accords with respondents' interpretation of the Act. For the reasons stated by Judge Warriner in his dissent in *Fleetwood,* I would not change this settled view of the law without an appropriate directive from Congress. Judge Warriner correctly observed:

> "Beginning with the first opinion dealing with the question, handed down in 1933, and continuing without wavering thereafter, the courts have uniformly inter-

preted the term 'change in conditions' in Section 22 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 922 (1982), to refer exclusively to a change in the physical condition of the employee receiving compensation. This also was 'the meaning generally attributed to similar phraseology in state workman's compensation acts' in existence before or shortly after the enactment of the LHWCA in 1927. *See Atlantic Coast Shipping Co. v. Golubiewski,* 9 F. Supp. 315, 317 (D. Md. 1934).

"The majority's nice effort to distinguish this prior case law serves only to highlight the numerous and varied factual situations in which the federal courts have withstood temptation and have strictly adhered to this interpretation. In *McCormick Steamship Co. v. United States Employees' Compensation Commission,* 64 F. 2d 84 (9th Cir. 1933), for example, the Court refused to allow the modification of a compensation order under Section 22 where the employee's earnings were diminished as a result of deteriorating economic conditions. *Id.,* at 85. Conversely, the fact that an employee received higher wages because of better economic conditions in the 1940's was held not to constitute a 'change in conditions' so as to allow a reduction in the employee's compensation award. *Burley Welding Works v. Lawson,* 141 F. 2d 964, 966 (5th Cir. 1944). The courts have refused to find a 'change in conditions' where the employee was imprisoned in a penitentiary for life, *Atlantic Coast Shipping Co. v. Golubiewski,* 9 F. Supp. at 316–19, or where the employee was committed to an insane asylum. *Bay Ridge Operating Co. v. Lowe,* 14 F. Supp. 280, 280–82 (S. D. N. Y. 1936).

"In every one of these cases, decided soon after the effective date of the Act, the respective courts explicitly stated and held that the term 'change in conditions' in Section 22 refers to the physical condition of the em-

> ployee receiving compensation. In a more recent case, *General Dynamics, Inc. v. Director, Office of Workers' Compensation Programs*, 673 F. 2d 23 (1st Cir. 1982), the court reiterated this interpretation: '[c]ourts uniformly have held a "change in conditions" means a change in the employee's *physical* condition, not other conditions.' *Id.*, at 25[, n. 6] (citing *Burley Welding Works, Inc. v. Lawson*, 141 F. 2d at 966).
>
> "Despite fifty years, and more, of precedent, the majority has overturned this established construction of the term 'change in conditions' and has revised it to have it apply to changes in economic conditions occurring during the term of compensation. Such a departure from settled prior case law is not warranted absent any indication from the Congress that such a change in the statute is what is desired by the lawmakers. Congress, it should not be necessary to add, indicates its desires by adopting legislation.
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> . . . . .
>
> "Fifty years is a long time. And perhaps it can be argued that the Board's, and the courts', and the Congress' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that the prior interpretation was not and is not the law." *Id.*, at 1235–1236 (footnotes omitted).

For those reasons, I would affirm the judgment of the Court of Appeals. Accordingly, I respectfully dissent.

JOHNSON ET AL. *v.* JONES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 94–455. Argued April 18, 1995—Decided June 12, 1995

Respondent Jones brought this "constitutional tort" action under 42 U. S. C. § 1983 against five named policemen, claiming that they used excessive force when they arrested him and that they beat him at the police station. As government officials, the officers were entitled to assert a qualified immunity defense. Three of them (the petitioners here) moved for summary judgment arguing that, whatever evidence Jones might have about the *other* two officers, he could point to no evidence that *these three* had beaten him or had been present during beatings. Holding that there was sufficient circumstantial evidence supporting Jones' theory of the case, the District Court denied the motion. Petitioners sought an immediate appeal, arguing that the denial was wrong because the evidence in the pretrial record was not sufficient to show a "genuine" issue of fact for trial, Fed. Rule Civ. Proc. 56(c). The Seventh Circuit held that it lacked appellate jurisdiction over this contention and dismissed the appeal.

Held: A defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. Pp. 309–320.

(a) Three background principles guide the Court. First, 28 U. S. C. § 1291 grants appellate courts jurisdiction to hear appeals only from district courts' "final decisions." Second, under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, and subsequent decisions, a so-called "collateral order" amounts to an immediately appealable "final decisio[n]" under § 1291, even though the district court may have entered it long before the case has ended, if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) will be effectively unreviewable on appeal from the final judgment. Third, in *Mitchell* v. *Forsyth*, 472 U. S. 511, 528, this Court held that a district court's order denying a defendant's summary judgment motion was an immediately appealable "collateral order" (*i. e.*, a "final decision") under *Cohen*, where (1) the defendant was a public official asserting a qualified immunity defense, and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of "clearly established" law. Pp. 309–312.

(b) Orders of the kind here at issue are not appealable for three reasons. First, considered purely as precedent, *Mitchell* itself does not support appealability because the underlying dispute therein involved the application of "clearly established" law to a given (for appellate purposes undisputed) set of facts, and the Court explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are "genuine," but the purely legal issue what law was "clearly established." Second, although *Cohen*'s conceptual theory of appealability finds a "final" district court decision in part because the immediately appealable decision involves issues significantly different from those that underlie the plaintiff's basic case, it will often prove difficult to find any such "separate" question where a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial. Finally, the competing considerations underlying questions of finality—the inconvenience and costs of piecemeal review, the danger of denying justice by delay, the comparative expertise of trial and appellate courts, and the wise use of appellate resources—argue against extending *Mitchell* to encompass orders of the kind at issue and in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Pp. 313–318.

(c) Neither of petitioners' arguments as to why the Court's effort to separate reviewable from unreviewable summary judgment determinations will prove unworkable—that the parties can easily manipulate the Court's holding and that appellate courts will have great difficulty in accomplishing such separation—presents a problem serious enough to require a different conclusion. Pp. 318–319.

26 F. 3d 727, affirmed.

BREYER, J., delivered the opinion for a unanimous Court.

Charles A. Rothfeld argued the cause for petitioners. With him on the briefs was *Mark F. Smolens.*

Cornelia T. L. Pillard argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Days, Assistant Attorney Gen-*

eral Hunger, Deputy Solicitor General Bender, Barbara L. Herwig, and *Richard A. Olderman.*

Edward G. Proctor, Jr., argued the cause for respondent. With him on the brief was *Anthony Pinelli.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida* and *Lawrence P. Fletcher-Hill,* Assistant Attorneys General, *Jeff Sessions,* Attorney General of Alabama, *Bruce M. Botelho,* Attorney General of Alaska, *Grant Woods,* Attorney General of Arizona, *Winston Bryant,* Attorney General of Arkansas, *Daniel E. Lungren,* Attorney General of California, *Gale A. Norton,* Attorney General of Colorado, *Richard Blumenthal,* Attorney General of Connecticut, *M. Jane Brady,* Attorney General of Delaware, *Garland Pinkston, Jr.*, Acting Corporation Counsel of the District of Columbia, *Michael J. Bowers,* Attorney General of Georgia, *Calvin E. Holloway, Sr.*, Acting Attorney General of Guam, *Margery S. Bronster,* Attorney General of Hawaii, *Alan G. Lance,* Attorney General of Idaho, *James E. Ryan,* Attorney General of Illinois, *Pamela Carter,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Carla J. Stovall,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Richard P. Ieyoub,* Attorney General of Louisiana, *Scott Harshbarger,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *Jeremiah W. (Jay) Nixon,* Attorney General of Missouri, *Joseph P. Mazurek,* Attorney General of Montana, *Don Stenberg,* Attorney General of Nebraska, *Frankie Sue Del Papa,* Attorney General of Nevada, *Jeffrey R. Howard,* Attorney General of New Hampshire, *Deborah T. Poritz,* Attorney General of New Jersey, *Tom Udall,* Attorney General of New Mexico, *Michael F. Easley,* Attorney General of North Carolina, *Heidi Heitkamp,* Attorney General of North Dakota, *Betty D. Montgomery,* Attorney General of Ohio, *W. A. Drew Edmondson,* Attorney General of Oklahoma, *Theodore R. Kulongoski,* Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Pedro Pierluisi,* Attorney General of Puerto Rico, *Jeffrey B. Pine,* Attorney General of Rhode Island, *Charles Molony Condon,* Attorney General of South Carolina, *Mark Barnett,* Attorney General of South Dakota, *Dan Morales,* Attorney General of Texas, *Jan Graham,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *James S. Gilmore III,* Attorney General of Virginia, *Christine O. Gregoire,* Attorney General of Washington, *James E. Doyle,* Attorney General of Wisconsin, and *Joseph B. Meyer,* JUSTICE BREYER delivered the opinion of the Court.

This case concerns government officials—entitled to assert a qualified immunity defense in a "constitutional tort" action—who seek an immediate appeal of a district court order denying their motions for summary judgment. The order in question resolved a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination. And, we affirm the similar holding of the Court of Appeals for the Seventh Circuit.

I

The plaintiff in this case, Houston Jones, is a diabetic. Police officers found him on the street while he was having an insulin seizure. The officers thought he was drunk, they arrested him, and they took him to the police station. Jones later found himself in a hospital, with several broken ribs. Subsequently, Jones brought this "constitutional tort" action against five named policemen. Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983. Jones claimed that these policemen used excessive force when they arrested him and that they beat him at the station.

Three of the officers (the petitioners here) moved for summary judgment arguing that, whatever evidence Jones might have about the *other* two officers, he could point to no evidence that *these three* had beaten him or had been present while others did so. Jones responded by pointing to his deposition, in which he swore that officers (though he did not name them) had used excessive force when arresting him and, later, in the booking room at the station house. He also pointed to the three officers' own depositions, in which they

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Attorney General of Wyoming; and for the International City/County Management Association et al. by *Richard Ruda* and *Lee Fennell*.

admitted they were present at the arrest and in or near the booking room when Jones was there.

The District Court denied the officers' summary judgment motion. The court wrote that Seventh Circuit precedent indicated potential liability if the three officers "stood by and allowed others to beat the plaintiff." App. to Pet. for Cert. 7a. And, the court held that there was "sufficient circumstantial evidence supporting [Jones'] theory of the case." *Id.*, at 8a.

The three officers immediately appealed the District Court's denial of their summary judgment motion. They argued, in relevant part, that the denial was wrong because the record contained "not a scintilla of evidence . . . that one or more" of them had "ever struck, punched or kicked the plaintiff, or ever observed anyone doing so." Brief for Appellants in No. 93–3777 (CA7), p. 10. But, the Seventh Circuit refused to consider this argument—namely, that the District Court had improperly rejected their contention that the record lacked sufficient evidence even to raise a "genuine" (*i. e.*, triable) issue of fact. The Seventh Circuit held that it "lack[ed] appellate jurisdiction over th[is] contention," *i. e.*, of the "evidence insufficiency" contention that "we didn't do it." 26 F. 3d 727, 728 (1994). It consequently dismissed their appeal.

Courts of Appeals hold different views about the immediate appealability of such pretrial "evidence insufficiency" claims made by public official defendants who assert qualified immunity defenses. Compare, *e. g.*, *Kaminsky* v. *Rosenblum*, 929 F. 2d 922, 926 (CA2 1991) (saying that no appellate jurisdiction exists); *Giuffre* v. *Bissell*, 31 F. 3d 1241, 1247 (CA3 1994) (same); *Boulos* v. *Wilson*, 834 F. 2d 504, 509 (CA5 1987) (same); *Elliott* v. *Thomas*, 937 F. 2d 338, 341–342 (CA7 1991) (same), cert. denied, 502 U. S. 1074, 1121 (1992); *Crawford-El* v. *Britton*, 951 F. 2d 1314, 1317 (CADC 1991) (same), with *Unwin* v. *Campbell*, 863 F. 2d 124, 128 (CA1

1988) (saying that appellate jurisdiction does exist); *Turner* v. *Dammon*, 848 F. 2d 440, 444 (CA4 1988) (same); *Kelly* v. *Bender*, 23 F. 3d 1328, 1330 (CA8 1994) (same); *Burgess* v. *Pierce County*, 918 F. 2d 104, 106, and n. 3 (CA9 1990) *(per curiam)* (same); *Austin* v. *Hamilton*, 945 F. 2d 1155, 1157, 1162–1163 (CA10 1991) (same). We therefore granted certiorari. 513 U. S. 1071 (1995).

II

A

Three background principles guide our effort to decide this issue. First, the relevant statute grants appellate courts jurisdiction to hear appeals only from "final decisions" of district courts. 28 U. S. C. § 1291. Given this statute, interlocutory appeals—appeals before the end of district court proceedings—are the exception, not the rule. The statute recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary. See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 430 (1985); *Flanagan* v. *United States*, 465 U. S. 259, 263–264 (1984); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981).

Of course, sometimes interlocutory appellate review has important countervailing benefits. In certain cases, it may avoid injustice by quickly correcting a trial court's error. It can simplify, or more appropriately direct, the future course of litigation. And, it can thereby reduce the burdens of future proceedings, perhaps freeing a party from those burdens entirely. Congress consequently has authorized, through other statutory provisions, immediate appeals (or has empowered courts to authorize immediate appeals) in certain classes of cases—classes in which these countervailing benefits may well predominate. None of these special "immediate appeal" statutes, however, is applicable here. See 28 U. S. C. § 1292 (immediate appeal of, *e. g.*, orders granting or denying injunctions; authority to "certify" certain important legal questions); Fed. Rule Civ. Proc. 54(b) (authorizing district courts to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties"); 28 U. S. C. §§ 1292(e), 2072(c) (1988 ed., Supp. V) (authorizing this Court to promulgate rules designating certain kinds of orders as immediately appealable); cf. 28 U. S. C. § 1651 (authorizing federal courts to "issue all writs necessary or appropriate," including writs of mandamus).

Second, in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), this Court held that certain so-called collateral orders amount to "final decisions," immediately appealable under the here-relevant statute, 28 U. S. C. § 1291, even though the district court may have entered those orders before (perhaps long before) the case has ended. These special "collateral orders" were those that fell within

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen, supra,* at 546.

More recently, this Court has restated *Cohen* as requiring that the order "'[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S.

139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978)).

In determining which "collateral orders" amount to "final decisions," these requirements help qualify for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak. The requirement that the issue underlying the order be "'effectively unreviewable'" later on, for example, means that failure to review immediately may well cause significant harm. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3911, pp. 334–335 (1992) (hereinafter Wright & Miller). The requirement that the district court's order "conclusively determine" the question means that appellate review is likely needed to avoid that harm. *Id.*, at 333. The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending). *Id.*, at 333–334.

Third, in *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), this Court held that a district court's order denying a defendant's motion for summary judgment was an immediately appealable "collateral order" (*i. e.*, a "final decision") under *Cohen*, where (1) the defendant was a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law. 472 U. S., at 528; see *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982) (holding that public officials are entitled to a "qualified immunity" from "liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known"). Applying *Cohen*'s criteria, the

Mitchell Court held that this kind of summary judgment order was, in a sense, "effectively unreviewable," for review after trial would come too late to vindicate one important purpose of "qualified immunity"—namely, protecting public officials, not simply from liability, but also from standing trial. *Mitchell, supra,* at 525–527. For related reasons, the Court found that the order was conclusive, *i. e.,* it "conclusively" settled the question of the defendant's immunity from suit. 472 U. S., at 527.

The Court in *Mitchell* found more difficult the "separability" question, *i. e.,* whether or not the "qualified immunity" issue was "completely separate from the merits of the action," *supra,* at 310. The Court concluded that:

> "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated." *Mitchell, supra,* at 527–528 (emphasis added).

And, the Court said that this "conceptual distinctness" made the immediately appealable issue "separate" from the merits of the plaintiff's claim, in part because an

> "appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took." *Id.,* at 528 (footnote omitted).

B

We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," *i. e.*, which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners' involvement in the alleged beating of respondent was not a "final decision" within the meaning of the relevant statute. We so decide essentially for three reasons.

First, consider *Mitchell* itself, purely as precedent. The dispute underlying the *Mitchell* appeal involved the application of "clearly established" law to a given (for appellate purposes undisputed) set of facts. And, the Court, in its opinion, explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are "genuine," Fed. Rule Civ. Proc. 56(c), but the purely legal issue what law was "clearly established." The opinion, for example, referred specifically to a district court's "denial of a claim of qualified immunity, *to the extent that it turns on an issue of law.*" 472 U. S., at 530 (emphasis added). It "emphasize[d] . . . that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Id.*, at 528, n. 9. It distinguished precedent not permitting interlocutory appeals on the ground that "a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.*, at 530, n. 10. And, it explained its separability holding by saying that "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.*, at 528. Although there is some language in the opinion that sounds as if it might imply the contrary, it does not do so when read in context. See, *e. g., id.*, at 526 (referring to defendant's entitlement to summary judgment, not to appealability, by saying that "defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue").

Second, consider, in the context of an "evidence sufficiency" claim, *Cohen*'s conceptual theory of appealability—the theory that brings immediate appealability within the scope of the jurisdictional statute's "final decision" requirement. That theory finds a "final" district court decision in part because the immediately appealable decision involves issues significantly different from those that underlie the plaintiff's basic case. As we have just pointed out, *Mitchell* rested upon the view that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." 472 U. S., at 527. It held that this was so because, although sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i. e.*, in the absence of qualified immunity). *Id.*, at 528.

Where, however, a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986) (district court's task, in deciding whether there is a "genuine" issue of fact, is to determine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); see also *Elliott* v. *Thomas*, 937 F. 2d, at 341 ("[W]hether the defendants did the deeds alleged . . . is *precisely* the question for trial") (emphasis in original), cert. denied, 502 U. S. 1074, 1121 (1992); *Wright* v. *South Arkansas*

Regional Health Center, Inc., 800 F. 2d 199, 203 (CA8 1986) (saying that this question "is . . . less clearly separable from the merits" than the question in *Mitchell*); see also Brief for United States 18 ("In one sense, a ruling regarding the sufficiency of the evidence is closely intertwined with the merits").

It has been suggested that *Mitchell* implicitly recognized that "the need to protect officials against the burdens of further pretrial proceedings and trial" justifies a relaxation of the separability requirement. 15A Wright & Miller §3914.10, at 656; see *id.*, §3911, at 344–345; *id.*, §3911.2, at 387; see also Tr. of Oral Arg. 20 ("[W]here the right not to be tried is at stake, [closer] association with the merits is tolerated") (argument of the United States). Assuming that to be so, and despite a similar interest in avoiding trial in the kind of case here at issue, we can find no separability. To take what petitioners call a small step beyond *Mitchell*, Brief for Petitioners 18, would more than relax the separability requirement—it would in many cases simply abandon it.

Finally, consider the competing considerations that underlie questions of finality. See *supra*, at 309–310. We of course decide appealability for categories of orders rather than individual orders. See *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 868 (1994). Thus, we do not now in each individual case engage in ad hoc balancing to decide issues of appealability. See generally P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 1810 (3d ed. 1988). But, that does not mean that, in delineating appealable categories, we should not look to "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 171 (1974) (quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511 (1950)). And, those considerations, which we discussed above in Part

II–A, argue against extending *Mitchell* to encompass orders of the kind before us.

For one thing, the issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters. Cf. *Pierce* v. *Underwood,* 487 U. S. 552, 560–561 (1988); *id.*, at 584 (White, J., concurring in part and dissenting in part) (noting that the "special expertise and experience of appellate courts" lies in "assessing the relative force of . . . applications of legal norms") (internal quotation marks omitted). And, to that extent, interlocutory appeals are less likely to bring important error-correcting benefits here than where purely legal matters are at issue, as in *Mitchell.* Cf. *Richardson-Merrell,* 472 U. S., at 434 (stating that the fact that "[m]ost pretrial orders [of the kind there at issue] are ultimately affirmed by appellate courts" militated against immediate appealability).

For another thing, questions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases, unlike the simple "we didn't do it" case before us, involve factual controversies about, for example, intent—controversies that, before trial, may seem nebulous. To resolve those controversies—to determine whether there is or is not a triable issue of fact about such a matter—may require reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials. This fact means, compared with *Mitchell,* greater delay.

For a third thing, the close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by the trial testimony) to require it, once again, to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision. See 15A Wright & Miller § 3914.10, at 664 ("[I]f [immunity appeals] could be limited to . . . issues of law . . . there would be less risk that the court of appeals would need to waste time in duplicating investigations of the same facts on successive appeals").

The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," we are persuaded that "[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law." 15A Wright & Miller § 3914.10, at 664; cf. *Puerto Rico Aqueduct*, 506 U. S., at 147 (noting the argument for a distinction between fact-based and law-based appeals, but seeing no "basis for drawing" it with respect to the particular kind of order at hand); 15A Wright & Miller § 3914.10, at 85 (1995 Supp.).

We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about preexisting "clearly established" law, or (b) a determination about "genuine" issues of fact for trial, it still forces public officials to trial. See Brief for Petitioners 11–16. And, to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

C

We mention one final point. Petitioners argue that our effort to separate reviewable from unreviewable summary judgment determinations will prove unworkable. First, they say that the parties can easily manipulate our holding. A defendant seeking to create a reviewable summary judgment order might do so simply by adding a reviewable claim to a motion that otherwise would create an unreviewable order. "[H]ere, for example," they say, "petitioners could have contended that the law was unclear on how much force may be exerted against suspects who resist arrest." Brief for Petitioners 29, n. 11.

We do not think this is a serious problem. We concede that, if the District Court in this case had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination. But, it does not automatically follow that the Court of Appeals would also have reviewed the here more important determination that there was a genuine issue of fact as to whether petitioners participated in (or were present at) a beating. Even assuming, for the sake of argument, that it may sometimes be appropriate to exercise "pendent appellate jurisdiction" over such a matter, but cf. *Swint* v. *Chambers County Comm'n,* 514 U. S. 35, 50–51 (1995), it seems unlikely that courts of appeals would do so in a case where the appealable issue appears simply a means to lead the court to review the underlying factual matter, see, *e. g., Natale* v. *Ridgefield,* 927 F. 2d 101, 104 (CA2 1991) (saying exercise of pendent appellate jurisdiction is proper only in "exceptional circumstances"); *United States ex rel. Valders Stone & Marble, Inc.* v. *C-Way Constr. Co.,* 909 F. 2d 259, 262 (CA7 1990) (saying exercise of such jurisdiction is proper only where there are " 'compelling reasons' ").

Second, petitioners add, if appellate courts try to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine"), they will have great difficulty doing so. District judges may simply deny summary judgment motions without indicating their reasons for doing so. How, in such a case, will the court of appeals know what set of facts to assume when it answers the purely legal question about "clearly established" law?

This problem is more serious, but not serious enough to lead us to a different conclusion. When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason. Knowing that this is "extremely helpful to a reviewing court," *Anderson,* 477 U. S., at 250, n. 6, district courts presumably will often state those facts. But, if they do not, we concede that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed. Regardless, this circumstance does not make a critical difference to our result, for a rule that occasionally requires a detailed evidence-based review of the record is still, from a practical point of view, more manageable than the rule that petitioners urge us to adopt. Petitioners' approach would make that task, not the exception, but the rule. We note, too, that our holding here has been the law in several Circuits for some time. See *supra,* at 308–309. Yet, petitioners have not pointed to concrete examples of the unmanageability they fear.

III

For these reasons, we hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. The judgment of the Court of Appeals for the Seventh Circuit is therefore

Affirmed.

KIMBERLIN *v.* QUINLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93–2068. Argued April 26, 1995—Decided June 12, 1995

6 F. 3d 789, vacated and remanded.

Howard T. Rosenblatt argued the cause for petitioner. With him on the briefs were *Jerrold J. Ganzfried* and *Ellen S. Winter.*

Deputy Solicitor General Bender argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger,* and *Cornelia T. L. Pillard.*

Michael L. Martinez argued the cause for respondents. With him on the brief were *Steven D. Gordon* and *William J. Dempster.**

**Anthony C. Epstein, Steven R. Shapiro, Arthur B. Spitzer, Leslie A. Brueckner,* and *Marc D. Stern* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Hawaii et al. by *Margery S. Bronster,* Attorney General of Hawaii, and *Girard D. Lau,* Deputy Attorney General, *Winston Bryant,* Attorney General of Arkansas, *Daniel E. Lungren,* Attorney General of California, *M. Jane Brady,* Attorney General of Delaware, *Alan G. Lance,* Attorney General of Idaho, *Pamela Carter,* Attorney General of Indiana, *Carla J. Stovall,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *Jeremiah W. Nixon,* Attorney General of Missouri, *Joseph P. Mazurek,* Attorney General of Montana, *Jeffrey R. Howard,* Attorney General of New Hampshire, *Victoria A. Graffeo,* Attorney General of New York, *Betty D. Montgomery,* Attorney General of Ohio, *Drew Edmondson,* Attorney General of Oklahoma, *Jeffrey B. Pine,* Attorney General of Rhode Island, *Mark Barnett,* Attorney General of South Dakota, *Jan Graham,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *James S. Gilmore III,* Attorney General of Virginia, *James E. Doyle,* Attorney General of Wisconsin, *Richard Weil,* Attorney General of the Commonwealth of the Northern

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Johnson* v. *Jones, ante,* p. 304.

Mariana Islands, and *Alva A. Swan,* Acting Attorney General of the Virgin Islands.

COMMISSIONER OF INTERNAL REVENUE *v.* SCHLEIER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94–500. Argued March 27, 1995—Decided June 14, 1995

On his 1986 federal income tax return, Erich Schleier (hereinafter respondent) included as gross income the backpay portion, but not the liquidated damages portion, of an award that he received in settlement of a claim under the Age Discrimination in Employment Act of 1967 (ADEA). After the Commissioner issued a deficiency notice, asserting that the liquidated damages should have been included as income, respondent initiated Tax Court proceedings, contesting that ruling and seeking a refund for the tax he had paid on his backpay. The Tax Court agreed with respondent that the entire settlement constituted "damages received . . . on account of personal injuries or sickness" within the meaning of § 104(a)(2) of the Internal Revenue Code and was therefore excludable from gross income. The Court of Appeals affirmed.

Held: Recovery under the ADEA is not excludable from gross income. A taxpayer must meet two independent requirements before a recovery may be excluded under § 104(a)(2): The underlying cause of action giving rise to the recovery must be "based upon tort or tort type rights," and the damages must have been received "on account of personal injuries or sickness." Respondent has failed to satisfy either requirement. Pp. 327–337.

(a) No part of respondent's settlement is excludable under § 104(a)(2)'s plain language. Recovery for back wages does not satisfy the critical requirement of being "on account of" any personal injury, and no personal injury affected the amount of back wages recovered. In addition, this Court explicitly held in *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111, 125, that Congress intended the ADEA's liquidated damages to be punitive in nature; thus, they serve no compensatory function and cannot be described as being "on account of personal injuries." Pp. 327–332.

(b) There is also no basis for excluding respondent's recovery from gross income under the Commissioner's regulation interpreting § 104(a)(2). Even if respondent were correct that this action is based on "tort or tort type rights" within 26 CFR § 1.104–1(c)'s meaning, this requirement is not a substitute for the statutory requirement that the amount be received "on account of personal injuries or sickness"; it is an additional requirement. Pp. 333–334.

(c) Nor is respondent's recovery based upon "tort or tort type rights" as that term was construed in *United States* v. *Burke*, 504 U. S. 229, where this Court rejected the argument that a taxpayer's backpay settlement under the pre-1991 Title VII of the Civil Rights Act of 1964 should be excluded from gross income. Two elements that distinguish the ADEA from the pre-1991 Title VII—namely, the ADEA rights to a jury trial and liquidated damages—are insufficient to bring the ADEA within *Burke*'s conception of a "tort or tort type righ[t]," for the statute lacks the primary characteristic of such an action: the availability of compensatory damages. Moreover, satisfaction of *Burke*'s "tort or tort type" inquiry does not eliminate the need to satisfy the other requirement for excludability discussed herein. Pp. 334–336.

26 F. 3d 1119, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., concurred in the judgment. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, and in Part II of which SOUTER, J., joined, *post*, p. 337.

Kent L. Jones argued the cause for petitioner. With him on the briefs were *Solicitor General Days, Assistant Attorney General Argrett, Deputy Solicitor General Wallace,* and *Ann B. Durney.*

Thomas F. Joyce argued the cause for respondents. With him on the brief were *Alan M. Serwer* and *Raymond C. Fay.**

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether § 104(a)(2) of the Internal Revenue Code authorizes a taxpayer to exclude from his gross income the amount received in settlement of a claim for backpay and liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA).

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*Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Advisory Council by *Douglas S. McDowell, Ann Elizabeth Reesman,* and *Kimberly L. Japinga;* for the Migrant Legal Action Program, Inc., by *Collette C. Goodman, Julie M. Edmond,* and *Robert B. Wasserman;* and for the Pan Am Pilots Tax Group by *Sanford Jay Rosen* and *Thomas Nolan.*

Cathy Ventrell-Monsees and *L. Steven Platt* filed a brief for the American Association of Retired Persons et al. as *amici curiae.*

I

Erich Schleier (respondent)[1] is a former employee of United Airlines, Inc. (United). Pursuant to established policy, United fired respondent when he reached the age of 60. Respondent then filed a complaint in Federal District Court alleging that his termination violated the ADEA.

The ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard* v. *Pons,* 434 U. S. 575, 577 (1978); *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111, 120 (1985); see also *McKennon* v. *Nashville Banner Publishing Co.,* 513 U. S. 352, 357 (1995). Subject to certain defenses, see 29 U. S. C. § 623(f) (1988 ed. and Supp. V), §§ 4 and 12 of the ADEA make it unlawful for an employer, *inter alia,* to discharge any individual between the ages of 40 and 70 "because of such individual's age." 29 U. S. C. §§ 623(a)(1), 631(a). The ADEA incorporates many of the enforcement and remedial mechanisms of the Fair Labor Standards Act of 1938 (FLSA). Like the FLSA, the ADEA provides for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U. S. C. § 626(b). That relief may include "without limitation judgments compelling employment, reinstatement or promotion." *Ibid.* More importantly for respondent's purposes, the ADEA incorporates FLSA provisions that permit the recovery "of wages lost and an additional equal amount as liquidated damages." § 216(b). See generally *McKennon,* 513 U. S., at 357.

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[1] Helen Schleier is also a respondent because she and her husband Erich filed a joint return.

Despite these broad remedial mechanisms, there are two important constraints on courts' remedial power under the ADEA. First, unlike the FLSA, the ADEA specifically provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U. S. C. § 626(b); see *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S., at 125. Second, the Courts of Appeals have unanimously held, and respondent does not contest, that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress.[2]

Respondent's ADEA complaint was consolidated with a class action brought by other former United employees challenging United's policy. The ADEA claims were tried before a jury, which determined that United had committed a willful violation of the ADEA. The District Court entered judgment for the plaintiffs, but that judgment was reversed on appeal. See *Monroe* v. *United Air Lines, Inc.*, 736 F. 2d 394 (CA7 1984). The parties then entered into a settlement, pursuant to which respondent received $145,629. Half of respondent's award was attributed to "backpay" and half to "liquidated damages." United did not withhold any payroll or income taxes from the portion of the settlement attributed to liquidated damages.

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[2] See, *e. g., Vazquez* v. *Eastern Air Lines, Inc.*, 579 F. 2d 107 (CA1 1978); *Johnson* v. *Al Tech Specialties Steel Corp.*, 731 F. 2d 143, 147 (CA2 1984); *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834 (CA3 1977); *Slatin* v. *Stanford Research Institute*, 590 F. 2d 1292 (CA4 1979); *Dean* v. *American Security Ins. Co.*, 559 F. 2d 1036 (CA5 1977), cert. denied, 434 U. S. 1066 (1978); *Hill* v. *Spiegel, Inc.*, 708 F. 2d 233 (CA6 1983); *Pfeiffer* v. *Essex Wire Corp.*, 682 F. 2d 684, 687–688 (CA7), cert. denied, 459 U. S. 1039 (1982); *Fiedler* v. *Indianhead Truck Line, Inc.*, 670 F. 2d 806 (CA8 1982); *Schmitz* v. *Commissioner*, 34 F. 3d 790 (CA9 1994); *Perrell* v. *FinanceAmerica Corp.*, 726 F. 2d 654 (CA10 1984); *Goldstein* v. *Manhattan Industries, Inc.*, 758 F. 2d 1435, 1446 (CA11 1985). See generally H. Eglit, 2 Age Discrimination § 18.19 (1982 and Supp. 1984); J. Kalet, Age Discrimination in Employment Law 110–111 (1986).

When respondent filed his 1986 federal income tax return, he included as gross income the backpay portion of the settlement, but excluded the portion attributed to liquidated damages. The Commissioner issued a deficiency notice, asserting that respondent should have included the liquidated damages as gross income. Respondent then initiated proceedings in the Tax Court, claiming that he had properly excluded the liquidated damages. Respondent also sought a refund for the tax he had paid on the backpay portion of the settlement. The Tax Court agreed with respondent that the entire settlement constituted "damages received . . . on account of personal injuries or sickness" within the meaning of § 104(a)(2) of the Tax Code and was therefore excludable from gross income. Relying on a prior Circuit decision that had in turn relied on our decision in *United States* v. *Burke*, 504 U. S. 229 (1992), the Court of Appeals for the Fifth Circuit affirmed. Judgt. order reported at 26 F. 3d 1119 (1994). Because the Courts of Appeals have reached inconsistent conclusions as to the taxability of ADEA recoveries in general and of the United settlement in particular, compare *Downey* v. *Commissioner*, 33 F. 3d 836 (CA7 1994) (United settlement award is taxable), with *Schmitz* v. *Commissioner*, 34 F. 3d 790 (CA9 1994) (United settlement award is excludable), we granted certiorari, 513 U. S. 998 (1994). Our consideration of the plain language of § 104(a), the text of the regulation implementing § 104(a)(2), and our reasoning in *Burke* convince us that a recovery under the ADEA is not excludable from gross income.

II

Section 61(a) of the Internal Revenue Code provides a broad definition of "gross income": "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived." 26 U. S. C. § 61(a). We have repeatedly emphasized the "sweeping scope" of this section and its statutory predecessors. *Commissioner* v. *Glenshaw*

Glass Co., 348 U. S. 426, 429 (1955). See also *United States* v. *Burke*, 504 U. S., at 233; *Helvering* v. *Clifford*, 309 U. S. 331, 334 (1940). We have also emphasized the corollary to § 61(a)'s broad construction, namely, the "default rule of statutory interpretation that exclusions from income must be narrowly construed." *United States* v. *Burke*, 504 U. S., at 248 (SOUTER, J., concurring in judgment); see *United States* v. *Centennial Savings Bank FSB*, 499 U. S. 573, 583–584 (1991); *Commissioner* v. *Jacobson*, 336 U. S. 28, 49 (1949); *United States* v. *Burke*, 504 U. S., at 244 (SCALIA, J., concurring in judgment).

Respondent recognizes § 61(a)'s "sweeping" definition and concedes that his settlement constitutes gross income unless it is expressly excepted by another provision in the Tax Code. Respondent claims, however, that his settlement proceeds are excluded from § 61(a)'s reach by 26 U. S. C. § 104(a).[3] Section 104(a) provides an exclusion for five cate-

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[3] At the time of respondent's return, § 104(a) provided in relevant part:

"Compensation for injuries or sickness

"(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

"(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

"(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

"(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

"(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; and

"(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secregories of "compensation for personal injuries or sickness." Respondent argues that his settlement award falls within the second of those categories, which excludes from gross income "the amount of any damages received . . . on account of personal injuries or sickness." § 104(a)(2).

In our view, the plain language of the statute undermines respondent's contention. Consideration of a typical recovery in a personal injury case illustrates the usual meaning of "on account of personal injuries." Assume that a taxpayer is in an automobile accident, is injured, and as a result of that injury suffers (a) medical expenses, (b) lost wages, and (c) pain, suffering, and emotional distress that cannot be measured with precision. If the taxpayer settles a resulting lawsuit for $30,000 (and if the taxpayer has not previously deducted her medical expenses, see § 104(a)), the entire $30,000 would be excludable under § 104(a)(2). The medical expenses for injuries arising out of the accident clearly constitute damages received "on account of personal injuries." Similarly, the portion of the settlement intended to compensate for pain and suffering constitutes damages "on account of personal injury."[4] Finally, the recovery for lost wages is also excludable as being "on account of personal injuries," as long as the lost wages resulted from time in which the taxpayer was out of work as a result of her injuries. See, *e. g.*,

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tary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States engaged in the performance of his official duties outside the United States." 26 U. S. C. § 104 (1988 ed. and Supp. V).

In 1989, § 104(a) was amended, adding, *inter alia*, the following provision: "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." *Ibid.*

[4] Though the text of § 104(a)(2) might be considered ambiguous on this point, it is by now clear that § 104(a)(2) encompasses recoveries based on intangible as well as tangible harms. See *United States* v. *Burke*, 504 U. S. 229, 235, n. 6 (1992); *id.*, at 244, and n. 3 (SCALIA, J., concurring in judgment) (acknowledging that "'personal injuries or sickness'" includes nonphysical injuries).

Threlkeld v. *Commissioner,* 87 T. C. 1294, 1300 (1986) (hypothetical surgeon who loses finger through tortious conduct may exclude any recovery for lost wages because "[t]his injury . . . will also undoubtedly cause special damages including loss of future income"), aff'd, 848 F. 2d 81 (CA6 1988). The critical point this hypothetical illustrates is that each element of the settlement is recoverable not simply because the taxpayer received a tort settlement, but rather because each element of the settlement satisfies the requirement set forth in § 104(a)(2) (and in all of the other subsections of § 104(a)) that the damages were received "on account of personal injuries or sickness."

In contrast, no part of respondent's ADEA settlement is excludable under the plain language of § 104(a)(2). Respondent's recovery of back wages, though at first glance comparable to our hypothetical accident victim's recovery of lost wages, does not fall within § 104(a)(2)'s exclusion because it does not satisfy the critical requirement of being "on account of personal injury or sickness." Whether one treats respondent's attaining the age of 60 or his being laid off on account of his age as the proximate cause of respondent's loss of income, neither the birthday nor the discharge can fairly be described as a "personal injury" or "sickness." Moreover, though respondent's unlawful termination may have caused some psychological or "personal" injury comparable to the intangible pain and suffering caused by an automobile accident, it is clear that no part of respondent's recovery of back wages is attributable to that injury. Thus, in our automobile hypothetical, the accident causes a personal injury which in turn causes a loss of wages. In age discrimination, the discrimination causes both personal injury and loss of wages, but neither is linked to the other. The amount of back wages recovered is completely independent of the existence or extent of any personal injury. In short, § 104(a)(2) does not permit the exclusion of respondent's back wages because the recovery of back wages was not "on account of" any personal injury and because no personal injury affected the amount of back wages recovered.

Respondent suggests, nonetheless, that the liquidated damages portion of his settlement fits comfortably within the plain language of § 104(a)(2)'s exclusion. He cites our observation in *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572 (1942), that liquidated damages under the FLSA "are compensation, not a penalty or punishment," and that such damages might compensate for "damages too obscure and difficult of proof for estimate." *Id.*, at 584–585; see also *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707 (1945). He argues that Congress must be presumed to have known of our interpretation of liquidated damages when it incorporated FLSA's liquidated damages provision into the ADEA, and that Congress must therefore have intended that liquidated damages under the ADEA serve, at least in part, to compensate plaintiffs for personal injuries that are difficult to quantify.

We agree with respondent that if Congress had intended the ADEA's liquidated damages to compensate plaintiffs for personal injuries, those damages might well come within § 104(a)(2)'s exclusion. There are, however, two weaknesses in respondent's argument. First, even if we assume that Congress was aware of the Court's observation in *Overnight Motor* that the liquidated damages authorized by the FLSA might provide compensation for some "obscure" injuries, it does not necessarily follow that Congress would have understood that observation as referring to injuries that were personal rather than economic. Second, and more importantly, we have previously rejected respondent's argument: We have already concluded that the liquidated damages provisions of the ADEA were a significant departure from those in the FLSA, see *Lorillard* v. *Pons*, 434 U. S., at 581; *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S., at 126, and we explicitly held in *Thurston:* "Congress intended for liquidated damages to be punitive in nature." *Id.*, at 125.[5]

Our holding in *Thurston* disposes of respondent's argument and requires the conclusion that liquidated damages under the ADEA, like back wages under the ADEA, are not received "on account of personal injury or sickness."[6]

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[5] We find it noteworthy that the Court in *Thurston* was presented with many of the arguments offered by respondent today. For example, to counter the argument that "the ADEA liquidated damages provision is punitive," the Equal Employment Opportunity Commission (EEOC) argued that "the legislative history of the liquidated damages provision in the ADEA—as in the FLSA—shows that such damages are designed to provide full compensation to the employee, rather than primarily to punish the employer." Brief for EEOC in *Transworld Airlines, Inc.* v. *Thurston*, O. T. 1984, Nos. 83-997 and 83-1325, p. 36. The EEOC continued: "Thus, Congress focused on the need to be fair to the *employee*, and to provide him full compensation for nonpecuniary damages not readily calculable, including emotional injuries such as humiliation and loss of self respect." *Id.*, at 36-37. See also *id.*, at 37 (relying on *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572 (1942)). Against this background, the Court's statement that "Congress intended for liquidated damages to be punitive in nature" can only be taken as a rejection of the argument that those damages are also (or are exclusively) compensatory.

We recognize that the House Conference Report accompanying the 1978 Amendments to the ADEA contains language that supports respondent. See H. R. Conf. Rep. No. 95-950 (1978). However, this evidence was before the Court in *Thurston*, see Brief for EEOC, at 37, and the Court did not find it persuasive. We see no reason to reach a different result now.

Moreover, there is much force to the Court's conclusion in *Thurston* that the ADEA's liquidated damages provisions are punitive. Under our decision in *Thurston*, liquidated damages are only available under the ADEA if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U. S., at 126 (internal quotation marks omitted). If liquidated damages were designed to compensate ADEA victims, we see no reason why the employer's knowledge of the unlawfulness of his conduct should be the determinative factor in the award of liquidated damages.

[6] We find odd the dissent's suggestion, *post*, at 341-342, that our holding today assumes that the intangible harms of discrimination do not constitute personal injuries. We of course have no doubt that the intangible harms of discrimination can constitute personal injury, and that compensation for

III

Respondent seeks to circumvent the plain language of § 104(a)(2) by relying on the Commissioner's regulation interpreting that section. Section 1.104–1(c) of the Treasury Regulations, 26 CFR § 1.104–1(c) (1994), provides:

> "Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution."

Respondent contends that an action to recover damages for a violation of the ADEA is "based upon tort or tort type rights" as those terms are used in that regulation, and that his settlement is thus excludable under the plain language of the regulation.

Even if we accept respondent's characterization of the action, but see *infra,* at 336, there is no basis for excluding the proceeds of his settlement from his gross income. The regulatory requirement that the amount be received in a tort type action is not a substitute for the statutory requirement that the amount be received "on account of personal injuries or sickness"; it is an additional requirement. Indeed, the statutory requirement is repeated in the regulation. As the Commissioner argues in her reply brief, an exclusion from gross income is authorized by the regulation "only when it both (i) was received through prosecution or settlement of an 'action based upon tort or tort type rights'. . . and (ii) was received

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such harms may be excludable under § 104(a)(2). However, to acknowledge that discrimination may cause intangible harms is not to say that the ADEA compensates for such harms, or that any of the damages received were on account of those harms.

'on account of personal injuries or sickness.'" Reply Brief for Petitioner 2.[7] We need not decide whether the Commissioner would have authority to dispense entirely with the statutory requirement, because she disclaims any intent to do so, and the text of the regulation does not belie her disclaimer. Thus, respondent's reliance on the text of the regulation is unpersuasive.

IV

Respondent also suggests that our decision in *United States* v. *Burke*, 504 U. S. 229 (1992), compels the conclusion that his settlement award is excludable. In *Burke*, we rejected the taxpayer's argument that the payment received in settlement of her backpay claim under the pre-1991 version of Title VII of the Civil Rights Act of 1964 was excludable from her gross income. Our decision rested on the conclusion that such a claim was not based upon "tort or tort type rights" within the meaning of the regulation quoted above. For two independent reasons, we think *Burke* provides no foundation for respondent's argument.

First, respondent's ADEA recovery is not based upon "tort or tort type rights" as that term was construed in *Burke*. In *Burke*, we examined the remedial scheme established by the pre-1991 version of Title VII. Noting that "Title VII does not allow awards for compensatory or punitive damages," and that "instead, it limits available remedies to backpay, injunctions, and other equitable relief," we concluded that Title VII was not tortlike because it addressed "'legal injuries of an economic character.'" 504 U. S., at 238, 239.

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[7] We recognize that the Commissioner has arguably in the past treated the regulation as though its second sentence superseded the first sentence. See, *e. g., United States* v. *Burke*, 504 U. S., at 242, n. 1 (SCALIA, J., concurring in judgment). In this case, however, the Commissioner unambiguously contends that the regulation is not intended to eliminate the "on account of" requirement from the statutory language. In view of the Commissioner's differing interpretations of her own regulation, we do not accord her present litigating position any special deference. We do agree, however, that she reads the regulation correctly in this case.

Respondent points to two elements of the ADEA that he argues distinguish it from the remedial scheme at issue in *Burke:* First, the ADEA provides for jury trial, see 29 U. S. C. § 626(b); *Lorillard* v. *Pons,* 434 U. S., at 585; but cf. *Lehman* v. *Nakshian,* 453 U. S. 156 (1981); and second, the ADEA allows for liquidated damages. We do not believe that these features of the ADEA are sufficient to bring it within *Burke*'s conception of a "tort type righ[t]." It is true, as respondent notes, that we emphasized in *Burke* the lack of a right to a jury trial and the absence of any provision for punitive damages as factors distinguishing the pre-1991 Title VII action from traditional tort litigation, 504 U. S., at 238–240. We did not, however, indicate that the presence of either or both of those factors would be sufficient to bring a statutory claim within the coverage of the regulation.

In our view, respondent's argument gives insufficient attention to what the *Burke* Court recognized as the primary characteristic of an "action based upon . . . tort type rights": the availability of compensatory remedies. Indeed, we noted that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *Id.,* at 235. We continued: "Although these damages often are described in compensatory terms . . . , in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury that are deemed important, even though not pecuniary in [their] immediate consequence[s]." *Ibid.* (internal quotation marks omitted). Against this background, we found critical that the pre-1991 version of Title VII provided no compensation "for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages." *Id.*, at 239.

Like the pre-1991 version of Title VII, the ADEA provides no compensation "for any of the other traditional harms associated with personal injury." Monetary remedies under the ADEA are limited to back wages, which are clearly of an "economic character," and liquidated damages, which we have already noted serve no compensatory function. Thus, though this is a closer case than *Burke*, we conclude that a recovery under the ADEA is not one that is "based upon tort or tort type rights."

Second, and more importantly, the holding of *Burke* is narrower than respondent suggests. In *Burke*, following the framework established in the Internal Revenue Service regulations, we noted that § 104(a)(2) requires a determination whether the underlying action is "based upon tort or tort type rights." *Id.*, at 234. In so doing, however, we did not hold that the inquiry into "tort or tort type rights" constituted the beginning and end of the analysis. In particular, though *Burke* relied on Title VII's failure to qualify as an action based upon tort type rights, we did not intend to eliminate the basic requirement found in both the statute and the regulation that only amounts received "on account of personal injuries or sickness" come within § 104(a)(2)'s exclusion. Thus, though satisfaction of *Burke*'s "tort or tort type" inquiry is a necessary condition for excludability under § 104(a)(2), it is not a sufficient condition.[8]

In sum, the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness." For the reasons discussed above, we believe that respondent has failed to satisfy either requirement, and thus no part of his settlement is excludable under § 104(a)(2).

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[8] We recognize that a recent Revenue Ruling from the IRS seems to rely on the same reading of *Burke* urged by respondent. See Rev. Rul. 93–88, 1993–2 Cum. Bull. 61. Though this Revenue Ruling is not before us, we note that "the Service's interpretive rulings do not have the force and effect of regulations," *Davis* v. *United States*, 495 U. S. 472, 484 (1990), and they may not be used to overturn the plain language of a statute. See, *e. g.*, *Bartels* v. *Birmingham*, 332 U. S. 126, 132 (1947).

The judgment is reversed.

It is so ordered.

JUSTICE SCALIA concurs in the judgment.

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins with respect to Part II, dissenting.

Age discrimination inflicts a personal injury. Even under the principles set forth in *United States* v. *Burke*, 504 U. S. 229 (1992), the damages received from a claim of such discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) are received "on account of" that personal injury and therefore excludable from taxable income under 26 U. S. C. § 104(a)(2). Unless the Court reads § 104(a)(2) to permit exclusion only of damages received for tangible injuries (*i. e.*, physical and mental injuries)—a reading rejected by eight Members of the Court in *Burke* and contradicted by an agency's reasonable interpretation of the statute it administers—the inescapable conclusion is that ADEA damages awards, are excludable.

I

It is not disputed that the damages received by respondents constitute gross income under 26 U. S. C. § 61(a) unless excluded elsewhere; the question is whether such damages fall within § 104(a)(2), which excludes from taxable income "the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness . . . ." What constitutes "damages received on account of personal injuries" is not obvious from the text or history of the statute, and since 1960 Internal Revenue Service (IRS) regulations have defined the phrase with reference to traditional tort principles: "The term 'damages received (whether by suit or agreement)' means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 25 Fed. Reg. 11490 (1960); 26 CFR § 1.104–1(c) (1994).

At one point in time, determining whether damages received from a lawsuit were excludable under § 104(a)(2) and the applicable regulation was a fairly straightforward task. In *Threlkeld* v. *Commissioner*, 87 T. C. 1294, 1299 (1986), aff'd, 848 F. 2d 81 (CA6 1988), the Tax Court, in a 15-to-1 decision, set forth the test as follows:

> "Section 104(a)(2) excludes from income amounts received as damages on account of personal injuries. Therefore, whether the damages received are paid on account of 'personal injuries' should be the beginning and the end of the inquiry. To determine whether the injury complained of is personal, we must look to the origin and character of the claim . . . , and not to the consequences that result from the injury." 87 T. C., at 1299.

Thus, under *Threlkeld*, damages from a lawsuit were excludable under § 104(a)(2) so long as they were received "on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law." *Id.*, at 1308.

Under this standard, ADEA damages surely are excludable. "[D]iscrimination in the workplace causes personal injury cognizable for purposes of § 104(a)(2), . . . and there can be little doubt about this point." *Burke, supra,* at 249 (O'CONNOR, J., dissenting). We have recognized that "racial discrimination . . . is a fundamental injury to the individual rights of a person." *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987). Such offense to the rights and dignity of the individual attaches regardless of whether the discrimination is based on race, sex, age, or other suspect characteristics. See, *e. g., Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 265 (1989) (O'CONNOR, J., concurring in judgment) ("[W]hatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual"); *EEOC* v. *Wyoming*, 460 U. S. 226, 231 (1983) (Age discrimination "inflict[s] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations"). Thus, prior to 1992, courts generally relied on *Threlkeld* to hold that damages awarded under the ADEA were excludable from income because they were received on account of personal injuries. See, *e. g., Pistillo* v. *Commissioner*, 912 F. 2d 145 (CA6 1990); *Rickel* v. *Commissioner*, 900 F. 2d 655 (CA3 1990); *Redfield* v. *Insurance Co. of North America*, 940 F. 2d 542 (CA9 1991).

Things changed, however, with *United States* v. *Burke, supra.* In that case, the Court of Appeals, relying on *Threlkeld*, held that race discrimination violative of Title VII infringes upon a victim's personal rights and thus that damages received therefrom are properly excludable under § 104(a)(2). Agreeing that discrimination violates personal rights, this Court nevertheless reversed because the statutory remedies do not "recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (*e. g.*, a ruined credit rating)." 504 U. S., at 239.

I dissented from the Court's decision in *Burke* because "the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce," *id.*, at 249, and I remain of that view today. Dean Prosser presciently observed years ago that "[t]he relation between the remedies in contract and tort presents a very confusing field, still in process of development, in which few courts have made any attempt to chart a path." W. Prosser, Law of Torts 635 (3d ed. 1964) (footnote omitted). Three decades later, and despite the Court's attempt to chart a path in *Burke* (or perhaps because of it), whether a remedy sounds in tort often depends on arbitrary characterizations. Compare *Schmitz* v. *Commissioner*, 34 F. 3d 790, 794 (CA9 1994) (ADEA liquidated damages are tortlike because they "compensate victims for damages which are too obscure and difficult to prove"), with *Downey* v. *Commissioner*, 33 F. 3d 836, 840 (CA7 1994) (ADEA liquidated damages, "as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations—as a type of contract remedy").

The Court today sidesteps these difficulties by laying down a new *per se* rule: An illegal discharge based on age cannot "fairly be described as a 'personal injury' or 'sickness.'" *Ante*, at 330. To justify this conclusion, the Court offers a hypothetical car crash, the injuries from which cause the taxpayer to miss work. She would be able, in such circumstances, to exclude the recovered lost wages because they would constitute damages received "'on account of personal injuries.'" *Ante*, at 329. By contrast, in the Court's view, ADEA damages are not excludable because they are not "'on account of' any personal injury and because no personal injury affected the amount of back wages recovered." *Ante*, at 331.

This reasoning assumes the wrong answer to the fundamental question of this case: What is a personal injury? Eight Justices in *Burke* agreed that discrimination inflicts a personal injury under § 104(a)(2). See 504 U. S., at 239–240; *id.*, at 247 (SOUTER, J., concurring in judgment); *id.*, at

249 (O'CONNOR, J., dissenting). Only JUSTICE SCALIA disagreed, arguing instead that the phrase "personal injuries" under § 104(a)(2) "is necessarily limited to injuries to physical or mental health," *id.*, at 244; in his view, employment discrimination, without more, does not inflict a personal injury because it is only a legal injury that causes economic deprivation, *ibid.* Whatever the merits of this view, it was rejected by the Court in *Burke* and wisely not advanced by the Commissioner in this case, see Brief for Petitioner 10, 25, n. 15.

Although the Court professes agreement with the view that "personal injury" within the meaning of § 104(a)(2) comprehends both tangible and intangible harms, *ante*, at 329, n. 4, the Court's analysis contradicts this fundamental premise. The Court's hypothetical contrast between wages lost due to a car crash and wages lost due to illegal discrimination would be significant only if one presumes that there is a relevant difference for purposes of § 104(a)(2) between the car crash and the illegal discrimination. But such a difference exists only if one reads "personal injuries," as JUSTICE SCALIA did in *Burke*, to include only tangible injuries. Those physical and mental injuries, of course, differ from the economic and stigmatic harms that discrimination inflicts upon its victims, but it is a difference without relevance under § 104(a)(2)—at least in the view of eight Justices in *Burke*, and the view that the Court professes to adopt today, *ante*, at 329, n. 4. The injuries from discrimination that the ADEA redresses—like the harm to reputation and loss of business caused by a dignitary tortlike defamation, see *Burke*, 504 U. S., at 234–235; *id.*, at 247 (SOUTER, J., concurring in judgment)—may not always manifest themselves in physical symptoms, but they are no less personal, see *supra*, at 339, and thus no less worthy of excludability under § 104(a)(2). The Court states: "Whether one treats respondent's attaining the age of 60 or his being laid off on account of his age as the proximate cause of respondent's loss of income, neither the birthday nor the discharge can fairly be described as a 'personal injury' or 'sickness.'" *Ante,* at 330. This assertion, the key to the Court's analysis, is not reconcilable with the Court's recognition that the intangible harms of illegal discrimination constitute "personal injuries" under § 104(a)(2).

The Court argues that although "the intangible harms of discrimination can constitute personal injury" within the meaning of § 104(a)(2), "to acknowledge that discrimination may cause intangible harms is not to say . . . that any of the damages received were on account of those harms." *Ante,* at 333, n. 6. The logic of this argument is rather hard to follow. If the harms caused by discrimination constitute personal injury, then amounts received as damages for such discrimination are received "on account of personal injuries" and should be excludable under § 104(a)(2).

II

Even overlooking this fundamental defect in the Court's analysis, ADEA damages should be excludable from taxable income under our precedents. The Court in *Burke* deferred to the applicable IRS regulation, 26 CFR § 1.104–1(c) (1991), and stated that "discrimination could constitute a 'personal injury' for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy." 504 U. S., at 239. The Court held that a suit based on Title VII was not based upon "tort or tort type rights," 26 CFR § 1.104–1(c) (1991), however, because Title VII does not entitle "victims of race-based employment discrimination to obtain a jury trial at which 'both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages' may be awarded." 504 U. S., at 240 (quoting *Johnson* v. *Railway Express Agency, Inc.,* 421 U. S. 454, 460 (1975)).

Unlike Title VII, the ADEA expressly provides that any person aggrieved may bring a civil action and "shall be entitled to a *trial by jury* of any issue of fact in any . . . action for recovery of amounts owing as a result of a violation of this chapter," 29 U. S. C. § 626(c)(2) (emphasis added). More important, the ADEA does not limit relief to back wages, but instead authorizes courts to grant the panoply of "such *legal or equitable relief* as will effectuate the purposes" of the Act, 29 U. S. C. § 626(c)(1) (emphasis added), and it expressly provides for liquidated damages in addition to back wages, 29 U. S. C. § 626(b). The Court emphasizes that liquidated damages under the ADEA are punitive in nature, *ante,* at 331–332, but it is an emphasis without relevance. Punitive damages are traditionally available only in tort. See 3 D. Dobbs, Law of Remedies 118 (2d ed. 1993) ("The rule against punitive damages prevails even if the breach [of contract] is wilful or malicious, as long as the breach does not amount to an independent tort"). Thus, whether the liquidated damages available under the ADEA are characterized as compensatory, or as a form of punitive damages, it is clear that the remedies available under the ADEA go beyond Title VII's limited focus on "'legal injuries of an economic character,'" *Burke, supra,* at 239 (quoting *Albemarle Paper Co* v. *Moody,* 422 U. S. 405, 418 (1975)). Plaintiffs claiming age discrimination, then, are not limited to the "circumscribed remedies available under Title VII," *Burke,* 504 U. S., at 240, but instead may sue under the ADEA, which appears to be one of the "other federal antidiscrimination statutes offering . . . broad remedies" distinguished by *Burke,* see *id.,* at 241.

These distinctions qualify an ADEA suit as a "tort type" action under *Burke,* and should entitle a prevailing plaintiff to exclude damages recovered therefrom from taxable income under § 104(a)(2) and the applicable IRS regulation, 26 CFR § 1.104–1(c) (1994). The Court seeks to avoid this conclusion by asserting that our decision in *Burke* and the IRS regulation that it interpreted do not conclusively determine the scope of § 104(a)(2). Both, according to the Court, *ante,* at 336, impose a necessary condition that the suit be tort or tort like, but neither states that this showing is sufficient for excludability under § 104(a)(2). This contention is untenable.

The Court's decision in *Burke* makes clear that it was deciding conclusively what § 104(a)(2) permits to be excluded. After quoting the language of § 104(a)(2), the Court introduced its analysis with the following: "Neither the text nor the legislative history of § 104(a)(2) offers any explanation of the term 'personal injuries.' Since 1960, however, IRS regulations formally have linked identification of a personal injury for purposes of § 104(a)(2) to traditional tort principles." 504 U. S., at 234. The Court then quoted language from the IRS regulation, 26 CFR § 1.104–1(c) (1991), which identified recovery from a suit "'based on tort or tort type rights'" as the hallmark of excludability under § 104(a)(2). Every Member of the Court so understood the opinion—that the scope of § 104(a)(2) is defined in terms of traditional tort principles. See 504 U. S., at 246–247 (SOUTER, J., concurring in judgment); *id.*, at 249 (O'CONNOR, J., dissenting). Even JUSTICE SCALIA, who disagreed with the Court that "personal injury or sickness" included nonphysical injuries, see *id.*, at 243–244 (opinion concurring in judgment), agreed that the IRS regulation is "descriptive of the ambit of § 104(a)(2) as a whole," *id.*, at 242, n. 1.

For 35 years the IRS has consistently interpreted its regulation, 26 CFR § 1.104–1(c), as conclusively establishing the requirements of § 104(a)(2). See Rev. Rul. 85–98, 1985–2 Cum. Bull. 51. This was the interpretation the Commissioner pressed upon us in *Burke*, see Brief for United States in *United States* v. *Burke*, O. T. 1991, No. 91–42, pp. 22–23; formally affirmed after *Burke*, see Rev. Rul. 93–88, 1993–2 Cum. Bull. 61; presented to the courts below, see Brief for Appellant in No. 93–5555 (CA5), p. 28, n. 16; and advanced in the opening briefs before us, see Brief for Petitioner 14, n. 5, 16–17, n. 7. It is only in one sentence in her reply brief that the Commissioner expressed a view at odds with 35 years of administrative rulings, agency practice, and representations to the courts—a sentence that the Court expands into its holding today.

The Court states that it does not accord the Commissioner's reply brief any special deference in light of the "differing interpretations of her own regulation," *ante*, at 334, n. 7. But ignoring the Commissioner's off-hand assertion in this case does not wipe the slate clean. There still remain 35 years of formal interpretations upon which taxpayers have relied and of agency positions upon which courts, including this one, have based their decisions. Unless the Court is willing to declare these positions to be unreasonable, they cannot be ignored. See *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986). The Court asserts that "'the Service's interpretive rulings do not have the force and effect of regulations,'" *ante*, at 336, n. 8 (quoting *Davis* v. *United States*, 495 U. S. 472, 484 (1990)). That is true; it also says nothing about the deference courts must give to such reasonable interpretations, and a fuller exposition of our precedent indicates that the level of deference is substantial. *Davis* states: "Although the Service's interpretive rulings do not have the force and effect of regulations, we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Ibid.* (citations omitted).

The Court states that the Commissioner "reads the regulation correctly in this case." *Ante*, at 334, n. 7. Even if true, that statement says nothing about whether her interpretation for the past 35 years is reasonable. Both may be reasonable; such is the nature of ambiguity. In any event, I do not agree that the Commissioner's reply brief correctly reads the regulation to impose a necessary, but not sufficient, condition for excludability under § 104(a)(2). Although the regulation purports to interpret the term "damages received (whether by suit or agreement)," that term is unambiguous; it plainly includes all kinds of damages—inflicted on property or person, based on contract or tort, received by suit or agreement. Read in context, the regulation seeks to define the overall ambit of § 104(a)(2)—specifically the concept of "personal injuries," the ambiguity of which gives rise to controversies over the scope of the exclusion under § 104(a)(2). The regulation is subtitled, "Damages received on account of personal injuries or sickness," and its first sentence reads: "Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." 26 CFR § 1.104–1(c) (1994). In light of the expansive scope of these statements and the futility of any attempt to define only "damages received," the regulation is more sensibly read as defining the entire scope of § 104(a)(2).

Finally, the Court states that agency rules and regulations "may not be used to overturn the plain language of a statute." *Ante,* at 336, n. 8. But the language of the statute is anything but plain. As the Court noted in *Burke,* "[n]either the text nor the legislative history of § 104(a)(2) offers any explanation of the term 'personal injuries.'" 504 U. S., at 234. That is why the IRS promulgated its regulation in 1960 linking the slippery concept of personal injury to traditional tort principles. The Court today stops short of declaring this regulation unreasonable; it merely asserts that the regulation's requirement of a tort or tort like injury is in addition to, not in place of, the statutory requirement that the damages be received "on account of personal injuries or sickness." But, as noted above, it is not clear where besides the definition of personal injury there is room in the statute for the agency to graft on this additional requirement. It is surely more reasonable to read the regulation as defining an ambiguous statutory phrase, rather than as imposing a superfluous precondition without any statutory basis.

For these reasons, I respectfully dissent.

CHANDRIS, INC., ET AL. *v.* LATSIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 94–325. Argued February 21, 1995—Decided June 14, 1995

Respondent Latsis' duties as a superintendent engineer for petitioner Chandris, Inc., required him to take voyages on Chandris' ships. He lost substantial vision in one eye after a condition that he developed while on one of those voyages went untreated by a ship's doctor. Following his recuperation, he sailed to Germany on the S. S. *Galileo* and stayed with the ship while it was in drydock for refurbishment. Subsequently, he sued Chandris for damages for his eye injury under the Jones Act, which provides a negligence cause of action for "any seaman" injured "in the course of his employment." The District Court instructed the jury that Latsis was a "seaman" if he was permanently assigned to, or performed a substantial part of his work on, a vessel, but that the time Latsis spent with the *Galileo* while it was in drydock could not be considered because the vessel was then out of navigation. The jury returned a verdict for Chandris based solely on Latsis' seaman status. The Court of Appeals vacated the judgment, finding that the jury instruction improperly framed the issue primarily in terms of Latsis' temporal relationship to the vessel. It held that the "employment-related connection to a vessel in navigation" required for seaman status under the Jones Act, *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337, 355, exists where an individual contributes to a vessel's function or the accomplishment of its mission; the contribution is limited to a particular vessel or identifiable group of vessels; the contribution is substantial in terms of its duration or nature; and the course of the individual's employment regularly exposes him to the hazards of the sea. It also found that the District Court erred in instructing the jury that the *Galileo*'s drydock time could not count in the substantial connection equation.

Held:

1. The "employment-related connection to a vessel in navigation" necessary for seaman status comprises two basic elements: The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, *id.*, at 355, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in both its duration and its nature. Pp. 354–372.

(a) The Jones Act provides heightened legal protections to seamen because of their exposure to the perils of the sea, but does not define the term "seaman." However, the Court's Jones Act cases establish the basic principles that the term does not include land-based workers, 498 U. S., at 348, and that seaman status depends "not on the place where the injury is inflicted . . . but on the nature of the seaman's service, his status as a member of the vessel, and his relationship . . . to the vessel and its operation in navigable waters," *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, 4. Thus, land-based maritime workers do not become seamen when they happen to be working aboard a vessel, and seamen do not lose Jones Act coverage when their service to a vessel takes them ashore. Latsis' proposed "voyage test"—under which any maritime worker assigned to a vessel for the duration of a voyage, whose duties contribute to the vessel's mission, would be a seaman for injuries incurred during that voyage—conflicts with this status-based inquiry. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, and *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 255, distinguished. Pp. 354–364.

(b) Beyond the basic themes outlined here, the Court's cases have been silent as to the precise relationship a maritime worker must bear to a vessel in order to come within the Jones Act's ambit, leaving the lower federal courts the task of developing appropriate criteria to distinguish "ship's company" from land-based maritime workers. Those courts generally require at least a significant connection to a vessel in navigation (or to an identifiable fleet of vessels) for a maritime worker to qualify as a seaman under the Jones Act. Pp. 364–368.

(c) The test for seaman status adopted here has two essential requirements. The first is a broad threshold requirement that makes all maritime employees who do the ship's work eligible for seaman status. *Wilander, supra,* at 355. The second requirement determines which of these eligible maritime employees have the required employment-related connection to a vessel in navigation to make them in fact entitled to Jones Act benefits. This requirement gives full effect to the remedial scheme created by Congress and separates sea-based maritime employees entitled to Jones Act protection from land-based workers whose employment does not regularly expose them to the perils of the sea. Who is a "member of a crew" is a mixed question of law and fact. A jury should be able to consider all relevant circumstances bearing on the two requirements. The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether he is a seaman, because the ultimate inquiry is whether the worker is part of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. Although seaman status is not merely a temporal concept, it includes a temporal element. A worker who spends only a small fraction of his working time aboard a vessel is fundamentally land-based and therefore not a crew member regardless of his duties. An appropriate rule of thumb is that a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. This figure is only a guideline that allows a court to take the question from the jury when a worker has a clearly inadequate temporal connection to the vessel. On the other hand, the seaman status inquiry should not be limited exclusively to an examination of the overall course of a worker's service with a particular employer, since his seaman status may change with his basic assignment. Pp. 368–372.

2. The District Court's drydock instruction was erroneous. Whether a vessel is in navigation is a fact-intensive question that can be removed from the jury's consideration only where the facts and the law will reasonably support one conclusion. Based upon the record here, the trial court failed adequately to justify its decision to remove that question from the jury. Moreover, the court's charge to the jury swept too broadly in prohibiting the jury from considering the time Latsis spent with the vessel while in drydock for any purpose. Pp. 372–376.

20 F. 3d 45, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which THOMAS and BREYER, JJ., joined, *post*, p. 377.

David W. McCreadie argued the cause for petitioners. With him on the briefs were *David F. Pope* and *Christ Stratakis.*

Lewis Rosenberg argued the cause for respondent. With him on the brief was *Barry I. Levy.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case asks us to clarify what "employment-related connection to a vessel in navigation," *McDermott Int'l, Inc.* v.

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*Briefs of *amici curiae* urging reversal were filed for the City of New York by *Paul A. Crotty* and *Leonard J. Koerner;* and for TECO Transport & Trade Corp. et al. by *Robert B. Acomb, Jr.,* and *Robert T. Lemon II.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Stevan C. Dittman* and *Larry S. Stewart;* and for the United Brotherhood of Carpenters and Joiners of America by *John R. Hillsman.*

Wilander, 498 U. S. 337, 355 (1991), is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U. S. C. App. § 688(a). In *Wilander,* we addressed the *type* of activities that a seaman must perform and held that, under the Jones Act, a seaman's job need not be limited to transportation-related functions that directly aid in the vessel's navigation. We now determine what *relationship* a worker must have to the vessel, regardless of the specific tasks the worker undertakes, in order to obtain seaman status.

I

In May 1989, respondent Antonios Latsis was employed by petitioner Chandris, Inc., as a salaried superintendent engineer. Latsis was responsible for maintaining and updating the electronic and communications equipment on Chandris' fleet of vessels, which consisted of six passenger cruise ships. Each ship in the Chandris fleet carried between 12 and 14 engineers who were assigned permanently to that vessel. Latsis, on the other hand, was one of two supervising engineers based at Chandris' Miami office; his duties ran to the entire fleet and included not only overseeing the vessels' engineering departments, which required him to take a number of voyages, but also planning and directing ship maintenance from the shore. Latsis claimed at trial that he spent 72 percent of his time at sea, App. 58; his immediate supervisor testified that the appropriate figure was closer to 10 percent, *id.,* at 180.

On May 14, 1989, Latsis sailed for Bermuda aboard the S. S. *Galileo* to plan for an upcoming renovation of the ship, which was one of the older vessels in the Chandris fleet. Latsis developed a problem with his right eye on the day of departure, and he saw the ship's doctor as the *Galileo* left port. The doctor diagnosed a suspected detached retina but failed to follow standard medical procedure, which would have been to direct Latsis to see an ophthalmologist on an emergency basis. Instead, the ship's doctor recommended that Latsis relax until he could see an eye specialist when the *Galileo* arrived in Bermuda two days later. No attempt was made to transport Latsis ashore for prompt medical care by means of a pilot vessel or helicopter during the 11 hours it took the ship to reach the open sea from Baltimore, and Latsis received no further medical care until after the ship arrived in Bermuda. In Bermuda, a doctor diagnosed a detached retina and recommended immediate hospitalization and surgery. Although the operation was a partial success, Latsis lost 75 percent of his vision in his right eye.

Following his recuperation, which lasted approximately six weeks, Latsis resumed his duties with Chandris. On September 30, 1989, he sailed with the *Galileo* to Bremerhaven, Germany, where the vessel was placed in drydock for a 6-month refurbishment. After the conversion, the company renamed the vessel the S. S. *Meridian.* Latsis, who had been with the ship the entire time it was in drydock in Bremerhaven, sailed back to the United States on board the *Meridian* and continued to work for Chandris until November 1990, when his employment was terminated for reasons that are not clear from the record.

In October 1991, Latsis filed suit in the United States District Court for the Southern District of New York seeking compensatory damages under the Jones Act, 46 U. S. C. App. § 688, for the negligence of the ship's doctor that resulted in the significant loss of sight in Latsis' right eye. The Jones Act provides, in pertinent part, that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ." The District Court instructed the jury that it could conclude that Latsis was a seaman within the meaning of the statute if it found as follows:

> "[T]he plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a

> substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers." App. 210.

The parties stipulated to the District Court's second requirement for Jones Act coverage—that Latsis' duties contributed to the accomplishment of the missions of the Chandris vessels. *Id.*, at 211. Latsis did not object to the seaman status jury instructions in their entirety, but only contested that portion of the charge which explicitly took from the jury's consideration the period of time that the *Galileo* was in drydock. The jury returned a verdict in favor of Chandris solely on the issue of Latsis' status as a seaman under the Jones Act. *Id.*, at 213.

Respondent appealed to the Court of Appeals for the Second Circuit, which vacated the judgment and remanded the case for a new trial. 20 F. 3d 45 (1994). The court emphasized that its longstanding test for seaman status under the Jones Act required "'a more or less permanent connection with the ship,'" *Salgado* v. *M. J. Rudolph Corp.*, 514 F. 2d 750, 755 (CA2 1975), a connection that need not be limited to time spent on the vessel but could also be established by the nature of the work performed. The court thought that the alternate formulation employed by the District Court (permanent assignment to the vessel or performance of a substantial part of his work on the vessel), which was derived from *Offshore Co.* v. *Robison*, 266 F. 2d 769, 779 (CA5 1959), improperly framed the issue for the jury primarily, if not solely, in terms of Latsis' temporal relationship to the vessel. With that understanding of what the language of the *Robison* test implied, the court concluded that the District Court's seaman status jury instructions constituted plain error under established Circuit precedent. The court then took this case as an opportunity to clarify its seaman status requirements, directing the District Court that the jury should be instructed on remand as follows:

> "[T]he test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea." 20 F. 3d, at 57.

Elsewhere on the same page, however, the court phrased the third prong as requiring a substantial connection in terms of both duration *and* nature. Finally, the Court of Appeals held that the District Court erred in instructing the jury that the time Latsis spent with the ship while it was in drydock could not count in the substantial connection equation. *Id.*, at 55–56. Judge Kearse dissented, arguing that the drydock instruction was not erroneous and that the remainder of the charge did not constitute plain error. *Id.*, at 58.

We granted certiorari, 513 U. S. 945 (1994), to resolve the continuing conflict among the Courts of Appeals regarding the appropriate requirements for seaman status under the Jones Act.*

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*We granted certiorari on the following question, set forth in the petition: "What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U. S. C. §688?" Pet. for Cert. i. Petitioners argue for the first time in their opening brief on the merits that, because respondent failed to raise a timely objection under Rule 51 of the Federal Rules of Civil Procedure, we should limit the scope of our review to the narrower issue of whether the District Court's seaman status jury instructions constituted "plain error." Brief for Petitioners 12–14. Under this Court's Rule 14.1(a), "[o]nly the questions set forth in the petition [for certiorari], or

II

The Jones Act provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U. S. C. App. § 688(a). Under general maritime law prevailing prior to the statute's enactment, seamen were entitled to "maintenance and cure" from their employer for injuries incurred "in the service of the ship" and to recover damages from the vessel's owner for "injuries received by seamen in consequence of the unseaworthiness of the ship," but they were "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." *The Osceola,* 189 U. S. 158, 175 (1903); see also *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367, 370–371 (1932). Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola,* thereby completing the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the "perils of the sea." See G. Gilmore & C. Black, Law of Admiralty § 6–21, pp. 328–329 (2d ed. 1975); Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985) (hereinafter Robertson). Justice Story identified this animating purpose behind the legal regime governing maritime injuries when he observed that seamen "are emphatically the wards of the admiralty" because they "are by the peculiarity of their lives liable to sudden sickness from

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fairly included therein, will be considered by the Court," see, *e. g.,* *Berkemer* v. *McCarty,* 468 U. S. 420, 443, n. 38 (1984), and our Rule 24.1(a) provides that a merits brief should not "raise additional questions or change the substance of the questions already presented" in the petition. See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.,* 510 U. S. 27, 31–32 (1993); *Taylor* v. *Freeland & Kronz,* 503 U. S. 638, 645–646 (1992). Because petitioners did not raise the issue in the petition for certiorari, we will not consider any argument they may have under Rule 51 concerning the effect of respondent's failure to object to the seaman status jury instructions in their entirety.

change of climate, exposure to perils, and exhausting labour." *Harden* v. *Gordon*, 11 F. Cas. 480, 485, 483 (No. 6,047) (CC Me. 1823). Similarly, we stated in *Wilander* that "[t]raditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" 498 U. S., at 354 (quoting *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 104 (1946) (Stone, C. J., dissenting)).

The Jones Act, however, does not define the term "seaman" and therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection. Early on, we concluded that Congress intended the term to have its established meaning under the general maritime law at the time the Jones Act was enacted. See *Warner* v. *Goltra*, 293 U. S. 155, 159 (1934). In *Warner*, we stated that "a seaman is a mariner of any degree, one who lives his life upon the sea." *Id.*, at 157. Similarly, in *Norton* v. *Warner Co.*, 321 U. S. 565, 572 (1944), we suggested that "'every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage'" (quoting *The Buena Ventura*, 243 F. 797, 799 (SDNY 1916)).

Congress provided some content for the Jones Act requirement in 1927 when it enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), which provides scheduled compensation (and the exclusive remedy) for injury to a broad range of land-based maritime workers but which also explicitly excludes from its coverage "a master or member of a crew of any vessel." 44 Stat. (part 2) 1424, as amended, 33 U. S. C. § 902(3)(G). As the Court has stated on several occasions, the Jones Act and the LHWCA are mutually exclusive compensation regimes: " 'master or member of a crew' is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act." *Wilander,* 498 U. S., at 347. Indeed, "it is odd but true that the key requirement for Jones Act coverage now appears in another statute." *Ibid.* Injured workers who fall under neither category may still recover under an applicable state workers' compensation scheme or, in admiralty, under general maritime tort principles (which are admittedly less generous than the Jones Act's protections). See Cheavens, Terminal Workers' Injury and Death Claims, 64 Tulane L. Rev. 361, 364–365 (1989).

Despite the LHWCA language, drawing the distinction between those maritime workers who should qualify as seamen and those who should not has proved to be a difficult task and the source of much litigation—particularly because "the myriad circumstances in which men go upon the water confront courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman." *Brown* v. *ITT Rayonier, Inc.,* 497 F. 2d 234, 236 (CA5 1974). The federal courts have struggled over the years to articulate generally applicable criteria to distinguish among the many varieties of maritime workers, often developing detailed multipronged tests for seaman status. Since the 1950's, this Court largely has left definition of the Jones Act's scope to the lower courts. Unfortunately, as a result, "[t]he perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review." Gilmore & Black, *supra,* § 6–1, at 272. Or, as one court paraphrased Diderot in reference to this body of law: " 'We have made a labyrinth and got lost in it. We must find our way out.' " *Johnson* v. *John F. Beasley Constr. Co.,* 742 F. 2d 1054, 1060 (CA7 1984), cert. denied, 469 U. S. 1211 (1985); see 9 Oeuvres Complètes de Diderot, 203 (J. Assézat ed. 1875).

A

In *Wilander,* decided in 1991, the Court attempted for the first time in 33 years to clarify the definition of a "seaman" under the Jones Act. Jon Wilander was injured while assigned as a foreman supervising the sandblasting and painting of various fixtures and piping on oil drilling platforms in the Persian Gulf. His employer claimed that he could not qualify as a seaman because he did not aid in the navigation function of the vessels on which he served. Emphasizing that the question presented was narrow, we considered whether the term "seaman" is limited to only those maritime workers who aid in a vessel's navigation.

After surveying the history of an "aid in navigation" requirement under both the Jones Act and general maritime law, we concluded that "all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform," 498 U. S., at 354, and that "the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation," *ibid.* Thus, we held that, although "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, . . . a seaman must be doing the ship's work." *Id.,* at 355. We explained that "[t]he key to seaman status is employment-related connection to a vessel in navigation," and that, although "[w]e are not called upon here to define this connection in all details, . . . we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status." *Ibid.*

Beyond dispensing with the "aid to navigation" requirement, however, *Wilander* did not consider the requisite connection to a vessel in any detail and therefore failed to end the prevailing confusion regarding seaman status.

B

Respondent urges us to find our way out of the Jones Act "labyrinth" by focusing on the seemingly activity-based policy underlying the statute (the protection of those who are exposed to the perils of the sea), and to conclude that anyone working on board a vessel for the duration of a "voyage" in furtherance of the vessel's mission has the necessary employment-related connection to qualify as a seaman. Brief for Respondent 12–17. Such an approach, however, would run counter to our prior decisions and our understanding of the remedial scheme Congress has established for injured maritime workers. A brief survey of the Jones Act's tortured history makes clear that we must reject the initial appeal of such a "voyage" test and undertake the more difficult task of developing a status-based standard that, although it determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury, nevertheless best furthers the Jones Act's remedial goals.

Our Jones Act cases establish several basic principles regarding the definition of a seaman. First, "[w]hether under the Jones Act or general maritime law, seamen do not include land-based workers." *Wilander, supra,* at 348; see also Allbritton, Seaman Status in *Wilander*'s Wake, 68 Tulane L. Rev. 373, 387 (1994). Our early Jones Act decisions had not recognized this fundamental distinction. In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926), we held that a longshoreman injured while stowing cargo, and while aboard but not employed by a vessel at dock in navigable waters, was a seaman covered by the Jones Act. Recognizing that "for most purposes, as the word is commonly used, stevedores are not 'seamen,'" the Court nevertheless concluded that "[w]e cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." *Id.,* at

52. Because stevedores are engaged in "a maritime service formerly rendered by the ship's crew," *ibid.* (citing *Atlantic Transport Co. of W. Va.* v. *Imbrovek,* 234 U. S. 52, 62 (1914)), we concluded, they should receive the Jones Act's protections. See also *Uravic* v. *F. Jarka Co.,* 282 U. S. 234, 238 (1931); *Jamison* v. *Encarnacion,* 281 U. S. 635, 639 (1930). In 1946, the Court belatedly recognized that Congress had acted, in passing the LHWCA in 1927, to undercut the Court's reasoning in the *Haverty* line of cases and to emphasize that land-based maritime workers should not be entitled to the seamen's traditional remedies. Our decision in *Swanson* v. *Marra Brothers, Inc.,* 328 U. S. 1, 7 (1946), acknowledged that Congress had expressed its intention to "confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by [the LHWCA]." See also *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 257 (1940). Through the LHWCA, therefore, Congress "explicitly den[ied] a right of recovery under the Jones Act to maritime workers not members of a crew who are injured on board a vessel." *Swanson, supra,* at 6. And this recognition process culminated in *Wilander* with the Court's statement that, "[w]ith the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen." 498 U. S., at 347.

In addition to recognizing a fundamental distinction between land-based and sea-based maritime employees, our cases also emphasize that Jones Act coverage, like the jurisdiction of admiralty over causes of action for maintenance and cure for injuries received in the course of a seaman's employment, depends "not on the place where the injury is inflicted . . . but on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters." *Swanson, supra,* at 4. Thus, maritime workers who obtain seaman status do not lose that protection automatically when on shore and may recover under the Jones Act whenever they are injured in the service of a vessel, regardless of whether the injury occurs on or off the ship. In *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36 (1943), the Court held a shipowner liable for injuries caused to a seaman by a fellow crew member while the former was on shore repairing a conduit that was a part of the vessel and that was used for discharging the ship's cargo. We explained: "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *Id.,* at 42–43. Similarly, the Court in *Swanson* emphasized that the LHWCA "leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board . . . or on shore." 328 U. S., at 7–8. See also *Braen* v. *Pfeifer Oil Transp. Co.,* 361 U. S. 129, 131–132 (1959).

Our LHWCA cases also recognize the converse: Land-based maritime workers injured while on a vessel in navigation remain covered by the LHWCA, which expressly provides compensation for injuries to certain workers engaged in "maritime employment" that are incurred "upon the navigable waters of the United States," 33 U. S. C. § 903(a). Thus, in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* 459 U. S. 297 (1983), we held that a worker injured while "working on a barge in actual navigable waters" of the Hudson River, *id.,* at 300, n. 4, could be compensated under the LHWCA, *id.,* at 324. See also *Parker* v. *Motor Boat Sales, Inc.,* 314 U. S. 244, 244–245 (1941) (upholding LHWCA coverage for a worker testing outboard motors who "was drowned when a motor boat in which he was riding capsized"). These decisions, which reflect our longstanding view of the LHWCA's scope, indicate that a maritime worker does not become a "member of a crew" as soon as a vessel leaves the dock.

It is therefore well settled after decades of judicial interpretation that the Jones Act inquiry is fundamentally status based: Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore. In spite of this background, respondent and JUSTICE STEVENS suggest that any maritime worker who is assigned to a vessel for the duration of a voyage—and whose duties contribute to the vessel's mission—should be classified as a seaman for purposes of injuries incurred during that voyage. See Brief for Respondent 14; *post*, at 377 (opinion concurring in judgment). Under such a "voyage test," which relies principally upon this Court's statements that the Jones Act was designed to protect maritime workers who are exposed to the "special hazards" and "particular perils" characteristic of work on vessels at sea, see, *e. g.*, *Wilander*, *supra*, at 354, the worker's activities at the time of the injury would be controlling.

The difficulty with respondent's argument, as the foregoing discussion makes clear, is that the LHWCA repudiated the *Haverty* line of cases and established that a worker is no longer considered to be a seaman simply because he is doing a seaman's work at the time of the injury. Seaman status is not coextensive with seamen's risks. See, *e. g.*, *Easley* v. *Southern Shipbuilding Corp.*, 965 F. 2d 1, 4–5 (CA5 1992), cert. denied, 506 U. S. 1050 (1993); Robertson 93 (following "the overwhelming weight of authority in taking it as given that seaman status cannot be established by any worker who fails to demonstrate that a significant portion of his work was done aboard a vessel" and acknowledging that "[s]ome workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen's protections" (footnote omitted)). A "voyage test" would conflict with our prior understanding of the Jones Act as fundamentally status based, granting the negligence cause of action to those maritime workers who form the ship's company. *Swanson, supra,* at 4–5; *O'Donnell, supra,* at 42–43.

Desper v. *Starved Rock Ferry Co.,* 342 U. S. 187, 190 (1952), is not to the contrary. Although some language in that case does suggest that whether an individual is a seaman depends upon "the activity in which he was engaged at the time of injury," the context of that discussion reveals that "activity" referred to the worker's employment as a laborer on a vessel undergoing seasonal repairs while out of navigation, and not to his precise task at the time of injury. Similarly, despite Justice Harlan's suggestion in dissent that the Court's decision in *Grimes* v. *Raymond Concrete Pile Co.,* 356 U. S. 252 (1958), necessarily construed the word seaman "to mean nothing more than a person injured while working at sea," *id.,* at 255, our short *per curiam* opinion in that case does not indicate that we adopted so expansive a reading of the statutory term. Citing our prior cases which emphasized that the question of seaman status is normally for the factfinder to decide, see, *e. g., Senko* v. *LaCrosse Dredging Corp.,* 352 U. S. 370, 371–372 (1957); *Bassett,* 309 U. S., at 257–258, we reversed the judgment of the Court of Appeals and held simply that the jury could have inferred from the facts presented that the petitioner was a member of a crew in light of his overall service to the company (as the District Court had concluded in ruling on a motion for a directed verdict at the close of petitioner's case). *Grimes, supra,* at 253. That neither *Desper* nor *Grimes* altered our established course in favor of a voyage test is confirmed by reference to our later decision in *Braen, supra,* at 131, in which we repeated that "[t]he injured party must of course have 'status as a member of the vessel' for it is seamen, not others who may work on the vessel (*Swanson* v. *Marra Bros.*, 328 U. S. 1, 4), to whom Congress extended the protection of the Jones Act."

We believe it is important to avoid "'engrafting upon the statutory classification of a "seaman" a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties.'" *Barrett* v. *Chevron, U. S. A., Inc.*, 781 F. 2d 1067, 1075 (CA5 1986) (en banc) (quoting *Longmire* v. *Sea Drilling Corp.*, 610 F. 2d 1342, 1347, n. 6 (CA5 1980)). In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." *Easley, supra*, at 5. Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured. *Reeves* v. *Mobile Dredging & Pumping Co.*, 26 F. 3d 1247, 1256 (CA3 1994). Unlike JUSTICE STEVENS, see *post*, at 383, we do not believe that any maritime worker on a ship at sea as part of his employment is automatically a member of the crew of the vessel within the meaning of the statutory terms. Our rejection of the voyage test is also consistent with the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular workday begins.

To say that our cases have recognized a distinction between land-based and sea-based maritime workers that precludes application of a voyage test for seaman status, however, is not to say that a maritime employee must work *only* on board a vessel to qualify as a seaman under the Jones Act. In *Southwest Marine, Inc.* v. *Gizoni*, 502 U. S. 81 (1991), decided only a few months after *Wilander*, we concluded that a worker's status as a ship repairman, one of the enumerated occupations encompassed within the term "employee" under the LHWCA, 33 U. S. C. § 902(3), did not necessarily restrict the worker to a remedy under that statute. We explained that, "[w]hile in some cases a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status, . . . not all ship repairmen lack the requisite connection as a matter of law. This is so because '[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel.'" *Gizoni, supra,* at 89 (quoting *Wilander,* 498 U. S., at 354) (footnote omitted). Thus, we concluded, the Jones Act remedy may be available to maritime workers who are employed by a shipyard and who spend a portion of their time working on shore but spend the rest of their time at sea.

Beyond these basic themes, which are sufficient to foreclose respondent's principal argument, our cases are largely silent as to the precise relationship a maritime worker must bear to a vessel in order to come within the Jones Act's ambit. We have, until now, left to the lower federal courts the task of developing appropriate criteria to distinguish the "ship's company" from those members of the maritime community whose employment is essentially land based.

C

The Court of Appeals for the First Circuit was apparently the first to develop a generally applicable test for seaman status. In *Carumbo* v. *Cape Cod S. S. Co.,* 123 F. 2d 991 (1941), the court retained the pre-*Swanson* view that "the word 'seaman' under the Jones Act [did] not mean the same thing as 'member of a crew' under the [LHWCA]," 123 F. 2d, at 994. It concluded that "one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act." *Id.,* at 995. To the phrase "member of a crew," on the other hand, the court gave a more restrictive meaning. The court adopted three elements to define the phrase that had been used at various times in prior cases, holding that "[t]he requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew.'" *Ibid.* Cf. *Senko, supra,* at 375 (Harlan, J., dissenting) ("According to past decisions, to be a 'member of a crew' an individual must have some connection, more or less permanent, with a ship and a ship's company"). Once it became clear that the phrase "master or member of a crew" from the LHWCA is coextensive with the term "seaman" in the Jones Act, courts accepted the *Carumbo* formulation of master or member of a crew in the Jones Act context. See *Boyd* v. *Ford Motor Co.*, 948 F. 2d 283 (CA6 1991); *Estate of Wenzel* v. *Seaward Marine Services, Inc.*, 709 F. 2d 1326, 1327 (CA9 1983); *Whittington* v. *Sewer Constr. Co.*, 541 F. 2d 427, 436 (CA4 1976); *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F. 2d 31, 36 (CA3 1975), cert. denied, 423 U. S. 1054 (1976); *McKie* v. *Diamond Marine Co.*, 204 F. 2d 132, 136 (CA5 1953). The Court of Appeals for the Second Circuit initially was among the jurisdictions to adopt the *Carumbo* formulation as the basis of its seaman status inquiry, see *Salgado* v. *M. J. Rudolph Corp.*, 514 F. 2d, at 755, but that court took the instant case as an opportunity to modify the traditional test somewhat (replacing the "more or less permanent connection" prong with a requirement that the connection be "substantial in terms of its (a) duration and (b) nature"), 20 F. 3d, at 57.

The second major body of seaman status law developed in the Court of Appeals for the Fifth Circuit, which has a substantial Jones Act caseload, in the wake of *Offshore Co.* v. *Robison,* 266 F. 2d 769 (CA5 1959). At the time of his injury, Robison was an oil worker permanently assigned to a drilling rig mounted on a barge in the Gulf of Mexico. In sustaining the jury's award of damages to Robison under the Jones Act, the court abandoned the aid in navigation requirement of the traditional test and held as follows:

> "[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." *Id.*, at 779 (footnote omitted).

Soon after *Robison*, the Fifth Circuit modified the test to allow seaman status for those workers who had the requisite connection with an "identifiable fleet" of vessels, a finite group of vessels under common ownership or control. *Braniff* v. *Jackson Avenue-Gretna Ferry, Inc.*, 280 F. 2d 523, 528 (1960). See also *Barrett*, 781 F. 2d, at 1074; *Bertrand* v. *International Mooring & Marine, Inc.*, 700 F. 2d 240 (CA5 1983), cert. denied, 464 U. S. 1069 (1984). The modified *Robison* formulation, which replaced the *Carumbo* version as the definitive test for seaman status in the Fifth Circuit, has been highly influential in other courts as well. See Robertson 95; *Miller* v. *Patton-Tully Transp. Co.*, 851 F. 2d 202, 204 (CA8 1988); *Caruso* v. *Sterling Yacht & Shipbuilders, Inc.*, 828 F. 2d 14, 15 (CA11 1987); *Bennett* v. *Perini Corp.*, 510 F. 2d 114, 115 (CA1 1975).

While the *Carumbo* and *Robison* approaches may not seem all that different at first glance, subsequent developments in the Fifth Circuit's Jones Act jurisprudence added a strictly temporal gloss to the Jones Act inquiry. Under *Barrett* v. *Chevron, U. S. A., Inc., supra*, if an employee's regular duties require him to divide his time between vessel and land, his status as a crew member is determined "in the context of his entire employment" with his current employer. *Id.*, at 1075. See also Allbritton, 68 Tulane L. Rev., at 386; *Longmire*, 610 F. 2d, at 1347 (explaining that a worker's seaman status "should be addressed with reference to the nature and location of his occupation taken as a whole"). In *Barrett,* the court noted that the worker "performed seventy to eighty percent of his work on platforms and no more than twenty to thirty percent of his work on vessels" and then concluded that, "[b]ecause he did not perform a substantial portion of his work aboard a vessel or fleet of vessels, he failed to establish that he was a member of the crew of a vessel." 781 F. 2d, at 1076. Since *Barrett,* the Fifth Circuit consistently has analyzed the problem in terms of the percentage of work performed on vessels for the employer in question—and has declined to find seaman status where the employee spent less than 30 percent of his time aboard ship. See, *e. g., Palmer* v. *Fayard Moving & Transp. Corp.,* 930 F. 2d 437, 439 (1991); *Lormand* v. *Superior Oil Co.,* 845 F. 2d 536, 541 (1987), cert. denied, 484 U. S. 1031 (1988); cf. *Leonard* v. *Dixie Well Service & Supply, Inc.,* 828 F. 2d 291, 295 (1987); *Pickle* v. *International Oilfield Divers, Inc.,* 791 F. 2d 1237, 1240 (1986), cert. denied, 479 U. S. 1059 (1987).

Although some Courts of Appeals have varied the applicable tests to some degree, see, *e. g., Johnson* v. *John F. Beasley Constr. Co.,* 742 F. 2d, at 1062–1063, the traditional *Carumbo* seaman status formulation and the subsequent *Robison* modification are universally recognized, and one or the other is applied in every Federal Circuit to have considered the issue. See Bull, Seaman Status Revisited: A Practical Guide To Status Determination, 6 U. S. F. Mar. L. J. 547, 562–572 (1994) (collecting cases). The federal courts generally require *at least* a significant connection to a vessel in navigation (or to an identifiable fleet of vessels) for a maritime worker to qualify as a seaman under the Jones Act. Although the traditional test requires a "more or less permanent connection" and the *Robison* formulation calls for "substantial" work aboard a vessel, "this general requirement varies little, if at all, from one jurisdiction to another," *Bull, supra,* at 587, and "[t]he courts have repeatedly held that the relationship creating seaman status must be substantial in point of time and work, and not merely sporadic," *id.*, at 587–588.

D

From this background emerge the essential contours of the "employment-related connection to a vessel in navigation," *Wilander*, 498 U. S., at 355, required for an employee to qualify as a seaman under the Jones Act. We have said that, in giving effect to the term "seaman," our concern must be "to define the meaning for the purpose of a particular statute" and that its use in the Jones Act "must be read in the light of the mischief to be corrected and the end to be attained." *Warner*, 293 U. S., at 158. Giving effect to those guiding principles, we think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.'" 498 U. S., at 355 (quoting *Robison*, 266 F. 2d, at 779). The Jones Act's protections, like the other admiralty protections for seamen, only extend to those maritime employees who do the ship's work. But this threshold requirement is very broad: "All who work at sea in the service of a ship" are *eligible* for seaman status. 498 U. S., at 354.

Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. See 1B A. Jenner, Benedict on Admiralty § 11a, pp. 2–10.1 to 2–11 (7th ed. 1994) ("If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied" (footnote omitted)). This requirement therefore determines which maritime employees in *Wilander*'s broad category of persons eligible for seaman status because they are "doing the ship's work," 498 U. S., at 355, are in fact entitled to the benefits conferred upon seamen by the Jones Act because they have the requisite employment-related connection to a vessel in navigation.

It is important to recall that the question of who is a "member of a crew," and therefore who is a "seaman," is a mixed question of law and fact. Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard. *Wilander*, 498 U. S., at 356. On the other hand, "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Ibid.* See also *Senko*, 352 U. S., at 374 (explaining that "the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact" and that "a jury's decision is final if it has a reasonable basis"). The jury should be permitted, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation to qualify as a member of the vessel's crew, to consider all relevant circumstances bearing on the two elements outlined above.

In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves. The principal formulations employed by the Courts of Appeals—"more or less permanent assignment" or "connection to a vessel that is substantial in terms of its duration and nature"—are simply different ways of getting at the same basic point: The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *Sieracki,* 328 U. S., at 104 (Stone, C. J., dissenting). Indeed, it is difficult to discern major substantive differences in the language of the two phrases. In our view, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Wallace* v. *Oceaneering Int'l,* 727 F. 2d 427, 432 (CA5 1984). The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Although we adopt the centerpiece of the formulation used by the Court of Appeals in this case—that a seaman must have a connection with a vessel in navigation that is substantial in both duration and nature—we should point out how our understanding of the import of that language may be different in some respects from that of the court below. The Court of Appeals suggested that its test for seaman status "does not unequivocally require a Jones Act seaman to be substantially connected to a vessel" in terms of time if the worker performs important work on board on a steady, although not necessarily on a temporally significant, basis. 20 F. 3d, at 53. Perhaps giving effect to this intuition, or perhaps reacting to the temporal gloss placed on the *Robison* language by later Fifth Circuit decisions, the court phrased its standard at one point as requiring a jury to find that a Jones Act plaintiff's contribution to the function of the vessel was substantial in terms of its duration *or* nature. 20 F. 3d, at 57. It is not clear which version ("duration or nature" as opposed to "duration and nature") the Court of Appeals intended to adopt for the substantial connection requirement—or indeed whether the court saw a significant difference between the two. Nevertheless, we think it is important that a seaman's connection to a vessel in fact be substantial in both respects.

We agree with the Court of Appeals that seaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases. As we have said, "[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it." *Wilander*, 498 U. S., at 356. Nevertheless, we believe that courts, employers, and maritime workers can all benefit from reference to these general principles. And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict. See, *e. g.*, *Palmer*, 930 F. 2d, at 439.

On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. Brief for Petitioners 14–15. When a maritime worker's basic assignment changes, his seaman status may change as well. See *Barrett,* 781 F. 2d, at 1077 (Rubin, J., dissenting) ("An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment"); *Longmire,* 610 F. 2d, at 1347, n. 6. For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position. See Cheavens, 64 Tulane L. Rev., at 389–390. Thus, nothing in our opinion forecloses Jones Act coverage, in appropriate cases, for JUSTICE STEVENS' paradigmatic maritime worker injured while reassigned to "a lengthy voyage on the high seas," *post,* at 386. While our approach maintains the status-based inquiry this Court's earlier cases contemplate, we recognize that seaman status also should not be some immutable characteristic that maritime workers who spend only a portion of their time at sea can never attain.

III

One final issue remains for our determination: whether the District Court erred in instructing the jurors that, "[i]n determining whether Mr. Latsis performed a substantial part of his work on the vessel, [they could] not consider the period of time the *Galileo* was in drydock in Germany, because during that time period she was out of navigation." We agree with the Court of Appeals that it did.

The foregoing discussion establishes that, to qualify as a seaman under the Jones Act, a maritime employee must have a substantial employment-related connection to a vessel *in navigation.* See *Wilander, supra,* at 354–355. Of course, any time Latsis spent with the *Galileo* while the ship was out of navigation could not count as time spent at sea for purposes of that inquiry, and it would have been appropriate for the District Court to make this clear to the jury. Yet the underlying inquiry whether a vessel is or is not "in navigation" for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide. See *Butler* v. *Whiteman,* 356 U. S. 271 (1958) *(per curiam);* 2 M. Norris, Law of Seamen § 30.13, p. 363 (4th ed. 1985) ("Whether the vessel is in navigation presents a question of fact to be determined by the trier of the facts. When the case is tried to a jury the fact question should be left to their consideration if sufficient evidence has been presented to provide the basis for jury consideration"). Removing the issue from the jury's consideration is only appropriate where the facts and the law will reasonably support only one conclusion, *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242, 250–251 (1986), and the colloquy between the court and counsel does not indicate that the District Court made any such findings before overruling respondent's objection to the drydock instruction. See Tr. 432. Based upon the record before us, we think the court failed adequately to justify its decision to remove the question whether the *Galileo* was "in navigation" while in Bremerhaven from the jury.

Under our precedent and the law prevailing in the Circuits, it is generally accepted that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside," *DiGiovanni* v. *Traylor Bros., Inc.,* 959 F. 2d 1119, 1121 (CA1) (en banc), cert. denied, 506 U. S.

827 (1992), even when the vessel is undergoing repairs. See *Butler, supra,* at 271; *Senko,* 352 U. S., at 373; Norris, *supra,* at 364 ("[A] vessel is in navigation . . . when it returns from a voyage and is taken to a drydock or shipyard to undergo repairs in preparation to making another trip, and likewise a vessel is in navigation, although moored to a dock, if it remains in readiness for another voyage" (footnotes omitted)). At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation. In *West* v. *United States,* 361 U. S. 118 (1959), we held that a shoreside worker was not entitled to recover for unseaworthiness because the vessel on which he was injured was undergoing an overhaul for the purpose of making her seaworthy and therefore had been withdrawn from navigation. We explained that, in such cases, "the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done." *Id.,* at 122. See also *United N. Y. and N. J. Sandy Hook Pilots Assn.* v. *Halecki,* 358 U. S. 613 (1959); *Desper,* 342 U. S., at 191. The general rule among the Courts of Appeals is that vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be "in navigation" whereas ships being transformed through "major" overhauls or renovations are not. See Bull, 6 U. S. F. Mar. L. J., at 582–584 (collecting cases).

Obviously, while the distinction at issue here is one of degree, the prevailing view is that "major renovations can take a ship out of navigation, even though its use before and after the work will be the same." *McKinley* v. *All Alaskan Seafoods, Inc.,* 980 F. 2d 567, 570 (CA9 1992). Our review of the record in this case uncovered relatively little evidence bearing on the *Galileo*'s status during the repairs, and even less discussion of the question by the District Court. On the one hand, the work on the Chandris vessel took only about six months, which seems to be a relatively short period of time for important repairs on oceangoing vessels. Cf. *id.,* at 571

(17-month-long project involving major structural changes took the vessel out of navigation); *Wixom* v. *Boland Marine & Manufacturing Co.,* 614 F. 2d 956 (CA5 1980) (similar 3-year project); see also *Senko, supra,* at 373 (noting that "[e]ven a transoceanic liner may be confined to berth for lengthy periods, and while there the ship is kept in repair by its 'crew' "—and that "[t]here can be no doubt that a member of its crew would be covered by the Jones Act during this period, even though the ship was never in transit during his employment"). On the other hand, Latsis' own description of the work performed suggests that the modifications to the vessel were actually quite significant, including the removal of the ship's bottom plates and propellers, the addition of bow thrusters, overhaul of the main engines, reconstruction of the boilers, and renovations of the cabins and other passenger areas of the ship. See App. 93–94. On these facts, which are similar to those in *McKinley,* it is possible that Chandris could be entitled to partial summary judgment or a directed verdict concerning whether the *Galileo* remained in navigation while in drydock; the record, however, contains no stipulations or findings by the District Court to justify its conclusion that the modifications to the *Galileo* were sufficiently extensive to remove the vessel from navigation as a matter of law. On that basis, we agree with the Court of Appeals that the District Court's drydock instruction was erroneous.

Even if the District Court had been justified in directing a verdict on the question whether the *Galileo* remained in navigation while in Bremerhaven, we think that the court's charge to the jury swept too broadly. Instead of simply noting the appropriate legal conclusion and instructing the jury not to consider the time Latsis spent with the vessel in drydock *as time spent with a vessel in navigation,* the District Court appears to have prohibited the jury from considering Latsis' stay in Bremerhaven *for any purpose.* In our view, Latsis' activities while the vessel was in drydock are at least marginally relevant to the underlying inquiry (whether Latsis was a seaman and not a land-based maritime employee). Naturally, the jury would be free to draw several inferences from Latsis' work during the conversion, not all of which would be in his favor. But the choice among such permissible inferences should have been left to the jury, and we think the District Court's broadly worded instruction improperly deprived the jury of that opportunity by forbidding the consideration of Latsis' time in Bremerhaven at all.

IV

Under the Jones Act, "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Wilander*, 498 U. S., at 356. On the facts of this case, given that essential points are in dispute, reasonable factfinders could disagree as to whether Latsis was a seaman. Because the question whether the *Galileo* remained "in navigation" while in drydock should have been submitted to the jury, and because the decision on that issue might affect the outcome of the ultimate seaman status inquiry, we affirm the judgment of the Court of Appeals remanding the case to the District Court for a new trial.

On remand, the District Court should charge the jury in a manner consistent with our holding that the "employment-related connection to a vessel in navigation" necessary to qualify as a seaman under the Jones Act, *id.*, at 355, comprises two basic elements: The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature. As to the latter point, the court should emphasize that the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not. By instructing juries in Jones Act cases accordingly, courts can give proper effect to the remedial scheme Congress has created for injured maritime workers.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE THOMAS and JUSTICE BREYER join, concurring in the judgment.

The majority has reached the odd conclusion that a maritime engineer, injured aboard ship on the high seas while performing his duties as an employee of the ship, might not be a "seaman" within the meaning of the Jones Act. This decision is unprecedented. It ignores the critical distinction between work performed aboard ship during a voyage—when the members of the crew encounter "the perils of the sea"—and maritime work performed on a vessel moored to a dock in a safe harbor. In my judgment, an employee of the ship who is injured at sea in the course of his employment is always a "seaman." I would leave more ambiguous, shorebound cases for another day. Accordingly, though I concur in the Court's disposition of this case, returning it to the District Court for a new trial, I disagree with the standard this Court directs the trial court to apply on remand.

I

The Jones Act,[1] 46 U. S. C. App. §688, provides, in part, "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law." In this case, it is undisputed that respondent, Antonios Latsis, was injured in the course of his employment. When the injury occurred, he was on board the steamship *Galileo*, a vessel in navigation in the Atlantic Ocean. He was therefore exposed to the perils of the sea; indeed, as the Court of Appeals correctly noted, "his injury was the result of such a peril."[2] Respondent was not a mere passenger; he was performing duties for his employer that contributed to the ship's mission. In common parlance, then, he was a member of the crew of the *Galileo.* I think these facts are sufficient to establish that respondent was, as a matter of law, a "seaman" within the meaning of the Jones Act at the time of his injury. Although the character of Latsis' responsibilities before the voyage began and after it ended would be relevant in determining his status if he had been injured while the ship was in port, they have no bearing on his status as a member of the *Galileo*'s crew during the voyage.

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[1] The "Jones Act" is actually §33 of the Merchant Marine Act, 1920, 41 Stat. 1007.

This conclusion follows, first, from the language of the Jones Act and of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. §901 *et seq.* The latter, a federal workers' compensation scheme for shore-based maritime workers, exempts any "master or member of a crew of any vessel," 33 U. S. C. §902(3)(G)—a formulation that, we have held, is coextensive with the term "seaman" in the Jones Act. *McDermott Int'l, Inc.* v. *Wilander,* 498 U. S. 337, 347 (1991). In ordinary parlance, an employee of a ship at sea who is on that ship as part of his employment and who contributes to the ship's mission is both a "seaman" and a "member of [the] crew of [the] vessel." Indeed, I am not sure how these words can reasonably be read to exclude such an employee. Surely none of the statutory language suggests that the individual must be a member of the ship's crew for longer than a single voyage.

My conclusion also comports with the clear purpose of the Jones Act and of the other maritime law remedies traditionally afforded to seamen:[3] to protect maritime workers from exposure to the perils of the sea. In *Wilander,* 498 U. S., at 354, we endorsed Chief Justice Stone's explanation of the admiralty law's favored treatment of seamen. Chief Justice Stone wrote:

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[2] "Latsis's employment did expose him to the perils of the sea—in fact, his injury was the result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling." 20 F. 3d 45, 55 (CA2 1994).

> "The liability of the vessel or owner for maintenance and cure, regardless of their negligence, was established long before our modern conception of contract. But it, like the liability to indemnify the seaman for injuries resulting from unseaworthiness, has been universally recognized as an obligation growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected. They are exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury.
>
> "For these reasons the seaman has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees. Justice Story said in *Reed* v. *Canfield,* Fed. Cas. No. 11,641, 1 Sumn. 195, 199: 'Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privi-

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[3] These remedies are maintenance and cure and recovery for unseaworthiness. See G. Gilmore & C. Black, Law of Admiralty, ch. VI (2d ed. 1975).

> leges, duties, and liabilities in the sea-service, which do not belong to home pursuits.'" *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 104–105 (1946) (dissenting opinion) (citations omitted).

This exposure to the perils of the sea is what separates seamen from longshoremen, who are subject to entirely different, and usually less advantageous, remedies for injuries suffered in the course of their employment. Chief Justice Stone continued:

> "It is for these reasons that throughout the long history of the maritime law the right to maintenance and cure, and later the right to indemnity for injuries attributable to unseaworthiness, have been confined to seamen. Longshoremen and harbor workers are in a class very different from seamen, and one not calling for the creation of extraordinary obligations of the vessel or its owner in their favor, more than other classes of essentially land workers. Unlike members of the crew of a vessel they do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed; they have the same recourse as land workers to avoid the hazards to which they are exposed, to ascertain the cause of their injury and to prove it in court." *Id.*, at 105.

In some cases, workers who labor on ships close to shore may face sufficient exposure to the perils of the sea to merit seaman status. The determination of seaman status will depend on the particular facts of the case. See, *e. g.*, *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187 (1952);[4] *Senko* v.

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[4] In *Desper*, we held that a workman on a moored barge was not a "seaman" at the time of his death even though "he was a probable navigator in the near future." 342 U. S., at 191. We noted that "[t]he many cases turning upon the question whether an individual was a 'seaman' demon-

LaCrosse Dredging Corp., 352 U. S. 370 (1957); *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 (1958); *Butler* v. *Whiteman*, 356 U. S. 271 (1958). When the extent and consequence of the employee's exposure to the seaman's hazards is facially unclear, a test like the majority's may be appropriate. But no ambiguity exists when an employee is injured on the high seas. Unquestionably, that employee faces the perils associated with the voyage. Incontrovertibly, that employee is a "master or member of a crew of any vessel," within the meaning of the LHWCA, and hence a "seaman" under the Jones Act. Whatever treatment Congress intended for employees working in proximity to the shoreline, certainly it intended to extend Jones Act protection to the captain and crew of a ship on the high seas.

This conclusion is consistent with every Jones Act case that this Court has decided. Justice Cardozo's opinion for the Court in *Warner* v. *Goltra*, 293 U. S. 155 (1934), set a course that we have consistently followed. Explaining our holding that the master of a tugboat is a "seaman," he explained that "[i]t is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.'" *Id.*, at 157.[5] Indeed, apart from the argument that a seaman must assist in performing the transportation function of the vessel—an argument finally put to rest in *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337 (1991)—I am not aware of a single Jones Act case decided by this Court, other

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strate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. . . . [T]here was no vessel engaged in navigation at the time of the decedent's death." *Id.*, at 190–191.

[5] The quotation is from a pre-Jones Act case, *The Buena Ventura*, 243 F. 797, 799 (SDNY 1916). Earlier in his opinion, Justice Cardozo had noted: "In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained." *Warner*, 293 U. S., at 156.

than *Warner,*[6] in which anyone even *argued* that an employee who was aboard the ship contributing to the ship's mission while the vessel was in navigation on the high seas was not a seaman. In light of the purposes of the Jones Act, that position is simply too farfetched. As a leading admiralty treatise has recognized, "[i]t seems never to have been questioned that any member of a ship's company who actually goes to sea, no matter what his (or her) duties may be, is a seaman." G. Gilmore & C. Black, Law of Admiralty § 6–21, p. 331 (2d ed. 1975).

Surely nothing in *Wilander* contradicts this basic proposition. In that opinion, we made several references to the importance of work performed on a voyage. Thus, we quoted from leading 19th-century treatises on admiralty: " 'The term mariner includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage. . . . [A]t all times and in all countries, all the persons who have been necessarily or properly employed in a vessel as colaborers to the great purpose of the voyage, have, by the law, been clothed with the legal rights of mariners.' " 498 U. S., at 344–345 (emphasis deleted), quoting E. Benedict, American Admiralty §§ 278, 241, pp. 158, 133–134 (1850). "An 1883 treatise declared: 'All persons employed on a vessel to assist in the main purpose of the voyage are mariners, and included under the name of seamen.' M. Cohen, Admiralty 239." 498 U. S., at 346. Summarizing our conclusion, we wrote:

> "We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the em-

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[6] Even in *Warner,* no one contested the basic proposition that an employee of a ship at sea is a "seaman." Instead, the issue in that case was whether the term "seaman" extended to the *captain* of such a ship, or whether it referred only to lower level employees. The Court, applying the "liberal construction" that Congress intended, held that the master was a "seaman."

> ployee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.*, at 354.

Our opinion in *Wilander* is thus entirely consistent with my view that while a vessel is at sea every member of its crew is a seaman within the meaning of the Jones Act.

II

Despite the language, history, and purpose of the Jones Act, the Court today holds that seaman status may require more than a single ocean voyage. The Court's opinion thus obscures, if it does not ignore, the distinction between the perils of the sea and the risks faced by maritime workers when a ship is moored to a dock. The test that the Court formulates may be appropriate for the resolution of cases in the latter category. The Court fails, however, to explain why the member of the crew of a vessel at sea is not always a seaman.

Respondent's argument, that "any worker who is assigned to a vessel for the duration of a voyage and whose duties contribute to the vessel's mission must be classified as a seaman respecting injuries incurred on that voyage," Brief for Respondent 14, is not inconsistent with the Court's view, *ante*, at 359–361, that an employee must occupy a certain status in order to qualify as a seaman. It merely recognizes that all members of a ship's crew have that status while the vessel is at sea. In contrast, when the ship is in a harbor, further inquiry may be necessary to separate land-based from sea-based maritime employees. The Court is therefore simply wrong when it states that a "'voyage test' would conflict with our prior understanding of the Jones Act as fundamentally status based, granting the negligence cause of action to those maritime workers who form the ship's company," *ante,* at 362. The "ship's company" is readily identifiable when the ship is at sea; the fact that it may be less so when the ship is in port is not an acceptable reason for refusing to rely on the voyage test in a case like this one.

The Court is also quite wrong to suggest that our prior cases "indicate that a maritime worker does not become a 'member of a crew' as soon as a vessel leaves the dock," *ante,* at 361. In neither of the two cases on which it relies to support this conclusion did the injured workman even claim the status of a seaman. In *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* 459 U. S. 297 (1983), we held that an employee of a firm that was building the foundation of a sewage treatment plant, which extended over the Hudson River adjacent to Manhattan, was covered by the LHWCA because he was injured while working on a barge in navigable waters. The Court of Appeals had denied coverage on the ground that this worker was not engaged in maritime employment. Thus, *Perini* had nothing to do with any possible overlap between the Jones Act and the LHWCA; this Court's reversal merely found a sufficient maritime connection to support LHWCA coverage of an admittedly shore-based worker.

The other case that the Court cites, *Parker* v. *Motor Boat Sales, Inc.,* 314 U. S. 244 (1941), involved a janitor who had drowned while riding in a motorboat on the James River near Richmond. The Court of Appeals had held that his widow was not entitled to compensation under the LHWCA on the alternative grounds (1) that the janitor was not acting in the course of his employment when the boat capsized, and (2) that the LHWCA did not apply because Virginia law could provide compensation. See *id.,* at 245. As in *Perini,* our opinion reversing that decision did not discuss the Jones Act, because no one had even mentioned the possibility that the janitor might be a "seaman." Because *Parker* was decided during the 19-year period "during which the Court did not recognize the mutual exclusivity of the LHWCA and the Jones Act," *Wilander*, 498 U. S., at 348,[7] it is not at all clear that the Court, if asked to do so, would not have found that the janitor was a Jones Act seaman as well as an LHWCA-covered employee. Accordingly, the cases cited by the majority lend no support to its holding that the member of a crew of a ship at sea is not always a seaman.

The Court's only other justification for refusing to apply a voyage test is its purported concern about a worker who might "walk into and out of coverage in the course of his regular duties." *Ante*, at 363 (internal quotation marks omitted). Because the only way that a seaman could walk out of Jones Act coverage during a voyage would be to quit his job and become a passenger (or possibly jump overboard), I take the majority's argument to mean that a single voyage is not a long enough time to establish seaman status.[8] I simply do not understand this argument. Surely a voyage is sufficient time to establish an employment-related, status-based connection to a vessel in navigation that exposes the employee to the perils of the sea. The majority cannot explain why an employee who signs on for a single journey is any less a "seaman" or "member of a crew" if he intends to become an insurance agent after the voyage than if he intends to remain with the ship. What is important is the employee's status at the time of the injury, not his status a day, a month, or a year beforehand or afterward.

Apparently, the majority's real concern about walking in and out of coverage is that an employer will be unable to predict which of his employees will be covered by the Jones Act, and which by the LHWCA, on any given day. I think it is a novel construction of the Jones Act to read it as a scheme to protect employers.[9] But even if Congress had shared the Court's concern, this case does not implicate it in the least. We are talking here about a lengthy voyage on the high seas. The employer controls who goes on that voyage; he knows, more or less, when that voyage will begin and when it will end. And, but for the majority's decision today, he would know that while the ship is at sea, all his employees thereon would be covered by the Jones Act and not by the LHWCA. Thus, no one is walking out of Jones Act coverage and into LHWCA coverage (or vice versa) without the employer's knowledge and control. Once again, the majority's concern—and its method of determining seaman status—is properly directed at injuries occurring while the ship is at port.

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[7] During this period, the Court incorrectly treated stevedores working on moored vessels as seamen covered by the Jones Act under the pre-LHWCA ruling in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926). See *Wilander*, 498 U. S., at 348–349.

[8] Or at least, it is not necessarily a long enough time. It depends on the facts. See *ante*, at 371–372.

As a matter of history, this concern with oscillating back and forth between different types of compensation systems recalls a very different and far more serious problem: the difficulty of defining who is a "maritime employee" (a class of workers that includes both seamen and longshoremen) and who is not. Over the powerful dissent of Justice Holmes, in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917), the Court held that the constitutional grant of admiralty and maritime jurisdiction to the federal courts prevented the State of New York from applying its workmen's compensation statute to a longshoreman who was injured on a gang plank about 10 feet seaward of Pier 49 in New York City. Jensen was a shore-based worker who had walked out of the coverage of the state law into an unprotected federal area—the area seaward of the shoreline. In enacting the

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[9] The Jones Act was passed to overturn the harsh rule of *The Osceola,* 189 U. S. 158 (1903), which disallowed any recovery by a seaman for negligence of the master or any member of the crew of his ship under general maritime law. *McDermott Int'l, Inc.* v. *Wilander,* 498 U. S. 337, 342 (1991). The aim of the statute, then, was to expand the remedies available to employees, not to aid their employers.

LHWCA, Congress in 1927 responded to *Jensen* and its progeny by extending federal protection to shore-based workers injured while temporarily on navigable waters. The statute excluded Jones Act seamen, on the one hand, and shore-based workers while they were on the landward side of the *Jensen* line, on the other. As we have explained on more than one occasion, then, the LHWCA was originally a "gap-filling" measure intended to create coverage for those workers for whom, after *Jensen,* States could not provide compensation. See, *e. g., Norton* v. *Warner Co.,* 321 U. S. 565, 570 (1944); *Davis* v. *Department of Labor and Industries of Wash.,* 317 U. S. 249, 252–253 (1942); see also S. Rep. No. 973, 69th Cong., 1st Sess., 16 (1926).[10]

Thus, the majority's concern about employees "walking in and out of coverage" evokes images of a real problem engendered by *Jensen*—the problem of employees changing their legal status, sometimes many times a day, merely by walking from one place to another in the course of their employment. That problem is not implicated in this case. At the time of his injury Latsis was employed, with the full knowledge of his employer, on a ship at sea. He could not walk out of coverage until the voyage was over. At the end of the voyage, if Latsis had taken on other duties, wholly or partly on land, and had been injured while so engaged, then the majority's concern might have substance. But in this case, the majority's concern—and its test for seaman status—is completely misplaced.

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[10] Whereas the LHWCA as enacted in 1927 responded to the problem of employees who walked out of state coverage every time they boarded a ship, the 1972 amendment to that Act responded to the opposite concern—longshoremen who walked out of federal coverage every time they left the ship. Because state compensation schemes were sometimes less generous than the LHWCA, Congress expanded the federal coverage to encompass injuries occurring on piers and adjacent land used for loading and unloading ships. See H. R. Rep. No. 92–1441, pp. 10–11 (1972). Because the class of workers protected by the LHWCA continued to be composed entirely of shore-based workers, the 1972 amendment appropriately preserved the exclusion of Jones Act seamen. It did not alter the original 1927 Act's constructive definition of "seaman" as "master or member of a crew of any vessel."

III

In my opinion every member of the crew of a vessel is entitled to the protection of the Jones Act during a voyage on the high seas, even if he was not a part of the crew before the ship left port, and even if he abandoned the ship the moment it arrived at its destination. This view is consistent with every Jones Act case this Court has ever decided, and it is faithful to the statutory purpose to provide special protection to those who must encounter the perils of the sea while earning their livelihood. Whether a sailor voluntarily signs on for a single voyage, as Jim Hawkins did,[11] or, like Billy Budd, is impressed into duty against his will,[12] he is surely a seaman when his ship sails, whatever fate might await him at the end of the voyage.

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[11] R. Stevenson, Treasure Island (1883).

[12] H. Melville, Billy Budd (1924).

WITTE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94–6187. Argued April 17, 1995—Decided June 14, 1995

After petitioner Witte pleaded guilty to a federal marijuana charge, a presentence report calculated the base offense level under the United States Sentencing Guidelines by aggregating the total quantity of drugs involved not only in Witte's offense of conviction but also in uncharged criminal conduct in which he had engaged with several co-conspirators. The resulting sentencing range was higher than it would have been if only the drugs involved in his conviction had been considered, but it still fell within the scope of the legislatively authorized penalty. The District Court accepted the report's aggregation in sentencing Witte, concluding that the other offenses were part of a continuing conspiracy that should be taken into account under the Guidelines as "relevant conduct," United States Sentencing Commission, Guidelines Manual § 1B1.3. When Witte was subsequently indicted for conspiring and attempting to import cocaine, he moved to dismiss the charges, arguing that he had already been punished for the offenses because that cocaine had been considered as "relevant conduct" at his marijuana sentencing. The court dismissed the indictment on grounds that punishment for the cocaine offenses would violate the Double Jeopardy Clause's prohibition against multiple punishments, but the Court of Appeals reversed. Relying on this Court's decision in *Williams* v. *Oklahoma*, 358 U. S. 576 (1959), it held that the use of relevant conduct to increase the punishment for a charged offense does not punish the offender for the relevant conduct.

Held: Because consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause, Witte's prosecution on cocaine charges does not violate the prohibition against multiple punishments. Pp. 395–406.

(a) This Court's precedents make clear that a defendant in Witte's situation is only punished, for double jeopardy purposes, for the offense of conviction. Traditionally, a sentencing judge may conduct a broad inquiry, largely unlimited either as to the kind of information he may consider or the source from which it may come. Against this background of sentencing history, the Court, in *Williams*, *supra*, specifically rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime. *Williams* governs this case, for it makes no difference in this context whether the enhancement occurred in the first or second proceeding. Here, as in *Williams*, the uncharged criminal conduct was used to enhance Witte's sentence within the range authorized by statute. Pp. 395–400.

(b) Other decisions of this Court reinforce the conclusion reached here. In repeatedly upholding recidivism statutes, the Court has rejected double jeopardy challenges because enhanced punishment imposed for a later offense is viewed as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. See, *e. g.*, *Gryger* v. *Burke*, 334 U. S. 728, 732. In addition, by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, the Court's cases necessarily imply that such consideration does not result in "punishment" for such conduct. See, *e. g.*, *McMillan* v. *Pennsylvania*, 477 U. S. 79. Pp. 400–401.

(c) Contrary to Witte's suggestion, the Guidelines do not somehow change the constitutional analysis. A defendant has not been "punished" any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account. In each case, the defendant is still being punished, for double jeopardy purposes, only for the offense of conviction. Pp. 401–404.

(d) The Guidelines include significant safeguards to protect Witte against having the length of his second sentence multiplied by duplicative consideration of the same criminal conduct already considered as "relevant conduct" for the marijuana sentence. And he would be able to vindicate his interests through appropriate appeals should the Guidelines be misapplied in any future sentencing proceeding. Even if the Sentencing Commission had not formalized sentencing for multiple convictions, district courts retain enough flexibility under the Guidelines to take into account the fact that conduct underlying the offense at issue has previously been taken into account in sentencing for another offense. Pp. 404–406.

25 F. 3d 250, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in Parts I, II, and IV of which REHNQUIST, C. J., and KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and in Part III of which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 406. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 407.

H. Michael Sokolow argued the cause for petitioner. With him on the briefs were *Roland E. Dahlin II* and *Thomas S. Berg.*

Edward C. DuMont argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris, Deputy Solicitor General Dreeben,* and *Joseph C. Wyderko.**

JUSTICE O'CONNOR delivered the opinion of the Court.†

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits successive prosecution or multiple punishment for "the same offence." This case, which involves application of the United States Sentencing Guidelines, asks us to consider whether a court violates that proscription by convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction.

I

In June 1990, petitioner Steven Kurt Witte and several co-conspirators, including Dennis Mason and Tom Pokorny, arranged with Roger Norman, an undercover agent of the Drug Enforcement Administration, to import large amounts of marijuana from Mexico and cocaine from Guatemala. Norman had the task of flying the contraband into the United States, with Witte providing the ground transportation for the drugs once they had been brought into the country. The following month, the Mexican marijuana source advised the conspiracy participants that cocaine might be added to the first shipment if there was room on the plane or if an insufficient quantity of marijuana was available. Norman was informed in August 1990 that the source was prepared to deliver 4,400 pounds of marijuana. Once Norman learned the location of the airstrip from which the narcotics would be transported, federal agents arranged to have the participants in the scheme apprehended in Mexico. Local authorities arrested Mason and four others on August 12 and seized 591 kilograms of cocaine at the landing field. While still undercover, Norman met Witte the following day to explain that the pilots had been unable to land in Mexico because police had raided the airstrip. Witte was not taken into custody at that time, and the activities of the conspiracy lapsed for several months.

**Peter Goldberger* and *Scott A. Srebnick* filed a brief for the National Association of Legal Defense Lawyers as *amicus curiae* urging reversal.

†THE CHIEF JUSTICE and JUSTICE KENNEDY join all but Part III of this opinion, and JUSTICE STEVENS joins only Part III.

Agent Norman next spoke with Witte in January 1991 and asked if Witte would be interested in purchasing 1,000 pounds of marijuana. Witte agreed, promised to obtain a $50,000 down payment, and indicated that he would transport the marijuana in a horse trailer he had purchased for the original 1990 transaction and in a motor home owned by an acquaintance, Sam Kelly. On February 7, Witte, Norman, and Kelly met in Houston, Texas. Norman agreed to give the drugs to Witte in exchange for the $25,000 in cash Witte had been able to secure at that time and for a promise to pay the balance of the down payment in three days. Undercover agents took the motor home and trailer away to load the marijuana, and Witte escorted Norman to Witte's hotel room to view the money. The agents returned the vehicles the next morning loaded with approximately 375 pounds of marijuana, and they arrested Witte and Kelly when the two men took possession of the contraband.

In March 1991, a federal grand jury in the Southern District of Texas indicted Witte and Kelly for conspiring and attempting to possess marijuana with intent to distribute it, in violation of 21 U. S. C. §§ 841(a) and 846. The indictment was limited on its face to conduct occurring on or about

January 25 through February 8, 1991, thus covering only the later marijuana transaction. On February 21, 1992, Witte pleaded guilty to the attempted possession count and agreed to cooperate "with the Government by providing truthful and complete information concerning this and all other offenses about which [he] might be questioned by agents of law enforcement," and by testifying if requested to do so. App. 14. In exchange, the Government agreed to dismiss the conspiracy count and, if Witte's cooperation amounted to "substantial assistance," to file a motion for a downward departure under the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual § 5K1.1 (Nov. 1994) (USSG).

In calculating Witte's base offense level under the Sentencing Guidelines, the presentence report prepared by the United States Probation Office considered the total quantity of drugs involved in all of the transactions contemplated by the conspirators, including the planned 1990 shipments of both marijuana and cocaine. Under the Sentencing Guidelines, the sentencing range for a particular offense is determined on the basis of all "relevant conduct" in which the defendant was engaged and not just with regard to the conduct underlying the offense of conviction. USSG § 1B1.3. The Sentencing Commission has noted that, "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." USSG § 1B1.3, comment., n. 2; see also USSG § 2D1.1, comment., nn. 6, 12. The presentence report therefore suggested that Witte was accountable for the 1,000 pounds of marijuana involved in the attempted possession offense to which he pleaded guilty, 15 tons of marijuana that Witte, Mason, and Pokorny had planned to import from Mexico in

1990, 500 kilograms of cocaine that the conspirators originally proposed to import from Guatemala, and the 591 kilograms of cocaine seized at the Mexican airstrip in August 1990.

At the sentencing hearing, both petitioner and the Government urged the court to hold that the 1990 activities concerning importation of cocaine and marijuana were not part of the same course of conduct as the 1991 marijuana offense to which Witte had pleaded guilty, and therefore should not be considered in sentencing for the 1991 offense. The District Court concluded, however, that because the 1990 importation offenses were part of the same continuing conspiracy, they were "relevant conduct" under § 1B1.3 of the Guidelines and should be taken into account. The court therefore accepted the presentence report's aggregation of the quantities of drugs involved in the 1990 and 1991 episodes, resulting in a base offense level of 40, with a Guideline range of 292 to 365 months' imprisonment. App. 80–81; see also USSG § 2D1.1. From that base offense level, Witte received a two-level increase for his aggravating role in the offense, see USSG § 3B1.1, and an offsetting two-level decrease for acceptance of responsibility, see USSG § 3E1.1. Finally, the court granted the Government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By virtue of that departure, the court sentenced Witte to 144 months in prison, see App. 76, which was 148 months below the minimum sentence of 292 months under the predeparture Guideline range. Witte appealed, but the Court of Appeals dismissed the case when Witte failed to file a brief.

In September 1992, another grand jury in the same district returned a two-count indictment against Witte and Pokorny for conspiring and attempting to import cocaine, in violation of 21 U. S. C. §§ 952(a) and 963. The indictment alleged that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offenses because the cocaine involved in the 1990 transactions had been considered as "relevant conduct" at sentencing for the 1991 marijuana offense. The District Court dismissed the indictment in February 1993 on grounds that punishment for the indicted offenses would violate the prohibition against multiple punishments contained in the Double Jeopardy Clause of the Fifth Amendment. App. 130–136.

The Court of Appeals for the Fifth Circuit reversed. 25 F. 3d 250 (1994). Relying on our decision in *Williams* v. *Oklahoma*, 358 U. S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." 25 F. 3d, at 258. Thus, although the sentencing court took the quantity of cocaine involved in the 1990 importation scheme into account when determining the sentence for Witte's 1991 marijuana possession offense, the Court of Appeals concluded that Witte had not been punished for the cocaine offenses in the first prosecution—and that the Double Jeopardy Clause therefore did not bar the later action. In reaching this result, the court expressly disagreed with contrary holdings in *United States* v. *Koonce*, 945 F. 2d 1145 (CA10 1991), cert. denied, 503 U. S. 994 (1992), and *United States* v. *McCormick*, 992 F. 2d 437 (CA2 1993), that when a defendant's actions are included in relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not form the basis for a later indictment without violating double jeopardy. We granted certiorari to resolve the conflict among the Circuits, 513 U. S. 1072 (1995), and now affirm.

II

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. We have explained that "the Clause serves the function of preventing both successive punishment and successive prosecution," *United States* v. *Dixon,* 509 U. S. 688, 704 (1993) (citing *North Carolina* v. *Pearce,* 395 U. S. 711 (1969)), and that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it," *Ex parte Lange,* 18 Wall. 163, 173 (1874). See also *Schiro* v. *Farley,* 510 U. S. 222, 229–230 (1994); *United States* v. *Halper,* 490 U. S. 435, 440, 451, n. 10 (1989). Significantly, the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* for such punishment. See *Price* v. *Georgia,* 398 U. S. 323, 326 (1970). That is, the Double Jeopardy Clause "prohibits merely punishing twice, or *attempting a second time to punish criminally,* for the same offense." *Helvering* v. *Mitchell,* 303 U. S. 391, 399 (1938) (emphasis added).

Petitioner clearly was neither prosecuted for nor convicted of the cocaine offenses during the first criminal proceeding. The offense to which petitioner pleaded guilty and for which he was sentenced in 1992 was attempted possession of marijuana with intent to distribute it, whereas the crimes charged in the instant indictment are conspiracy to import cocaine and attempted importation of the same. Under *Blockburger* v. *United States,* 284 U. S. 299, 304 (1932), "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." See also *Dixon, supra,* at 696 (emphasizing that the same inquiry generally applies "[i]n both the multiple punishment and multiple prosecution contexts"). Under the *Blockburger* test, the indictment in this case did not charge the same offense to which petitioner formerly had pleaded guilty.

Petitioner nevertheless argues that, because the conduct giving rise to the cocaine charges *was* taken into account during sentencing for the marijuana conviction, he effectively was "punished" for that conduct during the first proceeding. As a result, he contends, the Double Jeopardy Clause bars the instant prosecution. This claim is ripe at this stage of the prosecution—although petitioner has not yet been convicted of the cocaine offenses—because, as we have said, "courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977). See also *Ball* v. *United States,* 470 U. S. 856, 861, 864–865 (1985) (explaining that, for purposes of the double jeopardy inquiry, punishment "must be the equivalent of a criminal conviction and not simply the imposition of sentence"); *Ex parte Lange, supra,* at 173. Thus, if petitioner is correct that the present case constitutes a second attempt to punish him criminally for the same cocaine offenses, see *Helvering, supra,* at 399, then the prosecution may not proceed. We agree with the Court of Appeals, however, that petitioner's double jeopardy theory—that consideration of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range constitutes "punishment" for that conduct—is not supported by our precedents, which make clear that a defendant in that situation is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted.

Traditionally, "[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." *Nichols* v. *United States,* 511 U. S. 738, 747 (1994). We explained in *Williams* v. *New York,* 337 U. S. 241, 246 (1949), that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." That history, combined with a recognition of the need for individualized sentencing, led us to conclude that the Due Process Clause did not require "that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence." *Id.*, at 250–251. Thus, "[a]s a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols, supra,* at 747 (quoting *United States* v. *Tucker,* 404 U. S. 443, 446 (1972)). See also *Wisconsin* v. *Mitchell,* 508 U. S. 476, 485 (1993).

Against this background of sentencing history, we specifically have rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime. *Williams* v. *Oklahoma,* 358 U. S., at 576, arose out of a kidnaping and murder committed by the petitioner while attempting to escape from police after a robbery. Following his arrest, Williams pleaded guilty to murder and was given a life sentence. He was later convicted of kidnaping, which was then a capital offense in Oklahoma, and the sentencing court took into account, in assessing the death penalty, the fact that the kidnaping victim had been murdered. We rejected Williams' contention that this use of the conduct that had given rise to the prior conviction violated double jeopardy. Emphasizing that "the exercise of a sound discretion in such a case required consideration of all the circumstances of the crime," we made clear that "one of the aggravating circumstances involved in this kidnaping crime was the fact that petitioner shot and killed the victim in the course of its commission," and rejected the claim "that the sentencing judge was not entitled to consider that circumstance, along with all the other circumstances involved, in determining the proper sentence to be imposed for the kidnaping crime." *Id.*, at 585–586. We then disposed of the petitioner's double jeopardy claim as follows: "[I]n view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense . . . ." *Id.*, at 586. We thus made clear that use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause.

We find this case to be governed by *Williams;* it makes no difference in this context whether the enhancement occurred in the first or second sentencing proceeding. Here, petitioner pleaded guilty to attempted possession of marijuana with intent to distribute it, in violation of 21 U. S. C. §§ 841(a) and 846. The statute provides that the sentence for such a crime involving 100 kilograms or more of marijuana must be between 5 and 40 years in prison. § 841(b)(1)(B). By including the cocaine from the earlier transaction—and not just the marijuana involved in the offense of conviction—in the drug quantity calculation, the District Court ended up with a higher offense level (40), and a higher sentence range (292 to 365 months), than it would have otherwise under the applicable Guideline, which specifies different base offense levels depending on the quantity of drugs involved. USSG § 2D1.1. This higher Guideline range, however, still falls within the scope of the legislatively authorized penalty (5 to 40 years). As in *Williams*, the uncharged criminal conduct was used to enhance petitioner's sentence within the range authorized by statute. If use of the murder to justify the death sentence for the kidnaping conviction was not "punishment" for the murder in *Williams*, it is impossible to conclude that taking account of petitioner's plans to import cocaine in fixing the sentence for the marijuana conviction constituted "punishment" for the cocaine offenses.

Williams, like this case, concerned the double jeopardy implications of taking the circumstances surrounding a particular course of criminal activity into account in sentencing for a conviction arising therefrom. Similarly, we have made clear in other cases, which involved a defendant's background more generally and not conduct arising out of the same criminal transaction as the offense of which the defendant was convicted, that "[e]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction." *Nichols,* 511 U. S., at 747 (approving consideration of a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense). In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke,* 334 U. S. 728, 732 (1948). See also *Spencer* v. *Texas,* 385 U. S. 554, 560 (1967); *Oyler* v. *Boles,* 368 U. S. 448, 451 (1962); *Moore* v. *Missouri,* 159 U. S. 673, 677 (1895) (under a recidivist statute, "the accused is not again punished for the first offence" because "'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'").

In addition, by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in "punishment" for such conduct. In *McMillan* v. *Pennsylvania,* 477 U. S. 79 (1986), we upheld against a due process challenge Pennsylvania's Mandatory Minimum Sentencing Act, which imposed a 5-year minimum sentence for certain enumerated felonies if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. Significantly, we emphasized that the statute at issue "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.,* at 87–88. That is, the statute "simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm." *Id.,* at 89–90. For this reason, we approved the lesser standard of proof provided for in the statute, thereby "reject[ing] the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *Id.,* at 84 (quoting *Patterson* v. *New York,* 432 U. S. 197, 214 (1977)). These decisions reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.

We are not persuaded by petitioner's suggestion that the Sentencing Guidelines somehow change the constitutional analysis. A defendant has not been "punished" any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account. Cf. *McMillan, supra,* at 92 (perceiving no difference in the due process calculus depending upon whether consideration of the sentencing factor was discretionary or mandatory). As the Government argues, "[t]he fact that the sentencing process has become more transparent under the Guidelines . . . does not mean that the defendant is now being 'punished' for uncharged relevant conduct as though it were a distinct criminal 'offense.'" Brief for United States 23. The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional. *United States* v. *Wright*, 873 F. 2d 437, 441 (CA1 1989) (Breyer, J.) (explaining that, "very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment"). See also *Burns* v. *United States*, 501 U. S. 129, 133 (1991); *Mistretta* v. *United States*, 488 U. S. 361, 363–367 (1989). Regardless of whether particular conduct is taken into account by rule or as an act of discretion, the defendant is still being punished only for the offense of conviction.

JUSTICE STEVENS disagrees with our conclusion because, he contends, "[u]nder the Guidelines, . . . an offense that is included as 'relevant conduct' does not relate to the character of the offender (which is reflected instead by criminal history), but rather measures only the character of the offense." *Post*, at 411. The criminal history section of the Guidelines, however, does not seem to create this bright line distinction; indeed, the difference between "criminal history" and "relevant conduct" is more temporal than qualitative, with the former referring simply to a defendant's *past* criminal conduct (as evidenced by convictions and prison terms), see USSG § 4A1.1, and the latter covering activity arising out of the same course of criminal conduct as the instant offense, see USSG § 1B1.3.

To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the "character of the offense," the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute). But, while relevant conduct thus may relate to the severity of the particular crime, the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment. Similarly, as we have said in the recidivism cases, a crime committed by an offender with a prior conviction "is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U. S., at 732. Nothing about the labels given to these categories controls the use to which such information is put at sentencing. Under the Guidelines, therefore, as under the traditional sentencing regimes JUSTICE STEVENS approves, "it is difficult if not impossible to determine whether a given offense has affected the judge's assessment of the character of the offender, the character of the offense, or both." *Post*, at 411 (STEVENS, J., dissenting). Even under JUSTICE STEVENS' framework, the structure of the Guidelines should not affect the outcome of this case.

The relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and the recidivism statutes discussed above, are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity. Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant, that consideration of that conduct in sentencing has become "a tail which wags the dog of the substantive offense." *McMillan*, 477 U. S., at 88; cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 700 (1975). We hold that, where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry. Accordingly, the instant prosecution for the cocaine offenses is not barred by the Double Jeopardy Clause as a second attempt to punish petitioner for the same crime.

III

At its core, much of petitioner's argument addresses not a claim that the instant cocaine prosecution violates principles of double jeopardy, but the more modest contention that he should not receive a second sentence under the Guidelines for the cocaine activities that were considered as relevant conduct for the marijuana sentence. As an examination of the pertinent sections should make clear, however, the Guidelines take into account the potential unfairness with which petitioner is concerned.

Petitioner argues that the Sentencing Guidelines require that drug offenders be sentenced in a single proceeding for all related offenses, whether charged or uncharged. See Brief for Petitioner 20–23. Yet while the Guidelines certainly envision that sentences for multiple offenses arising out of the same criminal activity *ordinarily* will be imposed together, they also explicitly contemplate the possibility of separate prosecutions involving the same or overlapping "relevant conduct." See USSG § 5G1.3, comment., n. 2 (addressing cases in which "a defendant is prosecuted in . . . two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct"). There are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and § 5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (*i. e.*, had all of the offenses been prosecuted in a single proceeding). See USSG § 5G1.3, comment., n. 3.

Because the concept of relevant conduct under the Guidelines is reciprocal, § 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. If a defendant is serving an undischarged term of imprisonment "result[ing] from offense(s) that have been fully taken into account [as relevant conduct] in the determination of the offense level for the instant offense," § 5G1.3(b) provides that "the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." And where § 5G1.3(b) does not apply, an accompanying policy statement provides, "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." USSG § 5G1.3(c) (policy statement). Significant safeguards built into the Sentencing Guidelines therefore protect petitioner against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct; he would be able to vindicate his interests through appropriate appeals should the Guidelines be misapplied in any future sentencing proceeding.

Even if the Sentencing Commission had not formalized sentencing for multiple convictions in this way, district courts under the Guidelines retain enough flexibility in appropriate cases to take into account the fact that conduct underlying the offense at issue has previously been taken into account in sentencing for another offense. As the Commission has explained, "[u]nder 18 U. S. C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" USSG § 5K2.0 (policy statement). This departure power is also available to protect against petitioner's second major practical concern: that a second sentence for the same relevant conduct may deprive him of the effect of the downward departure under § 5K1.1 of the Guidelines for substantial assistance to the Government, which reduced his first sentence significantly. Should petitioner be convicted of the cocaine charges, he will be free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure.

IV

Because consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishments for the same offense. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 982–984, 993–994 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part); *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in part and concurring in judgment).

It is not true that (as the Court claims) "the language of the Double Jeopardy Clause protects against . . . the actual imposition of two punishments for the same offense." *Ante*, at 396. What the Clause says is that no person "shall . . . be subject for the same offence to be twice *put in jeopardy* of life or limb," U. S. Const., Amdt. 5 (emphasis added), which means twice *prosecuted* for the same offense. Today's decision shows that departing from the text of the Clause, and from the constant tradition regarding its meaning, as we did six years ago in *United States* v. *Halper*, 490 U. S. 435 (1989), requires us either to upset well-established penal practices, or else to perceive lines that do not really exist. Having created a right against multiple punishments *ex nihilo*, we now allow that right to be destroyed by the technique used on the petitioner here: "We do not punish you twice for the *same* offense," says the Government, "but we punish you *twice as much* for *one* offense solely because you also committed another offense, for which other offense we will also punish you (only once) later on." I see no real difference in that distinction, and decline to acquiesce in the erroneous holding that drives us to it.

In sum, I adhere to my view that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment." *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 804–805 (1994) (SCALIA, J., dissenting). Since petitioner was not twice prosecuted for the same offense, I concur in the judgment.

JUSTICE STEVENS, concurring in part and dissenting in part.

Petitioner pleaded guilty to attempting to possess with intent to distribute more than 100 kilograms of marijuana. At petitioner's sentencing hearing, the District Court heard evidence concerning petitioner's participation in a conspiracy to import cocaine. Pursuant to its understanding of the United States Sentencing Guidelines, the District Court considered the cocaine offenses as "relevant conduct" and increased petitioner's sentence accordingly. Petitioner received exactly the same sentence that he would have received had he been convicted of both the marijuana offenses and the cocaine offenses. The Government then sought to prosecute petitioner for the cocaine offenses.

The question presented is whether the Double Jeopardy Clause bars that subsequent prosecution. The Court today holds that it does not. In my view, the Court's holding is incorrect and unprecedented. More importantly, it weakens the fundamental protections the Double Jeopardy Clause was intended to provide.

I

In my view, the double jeopardy violation is plain. Petitioner's marijuana conviction, which involved 1,000 pounds of marijuana, would have resulted in a Guidelines range of 78 to 97 months. When petitioner's cocaine offenses were considered in the sentencing calculus, the new Guidelines range was 292 to 365 months. This was the range that the District Court used as the basis for its sentencing calculations.[1] Thus, the District Court's consideration of the cocaine offenses increased petitioner's sentencing range by over 200 months.

Under these facts, it is hard to see how the Double Jeopardy Clause is not implicated. In my view, quite simply, petitioner was put in jeopardy of punishment for the cocaine transactions when, as mandated by the Guidelines, he was in fact punished for those offenses. The Double Jeopardy Clause should thus preclude any subsequent prosecution for those cocaine offenses.

II

Despite the intuitive appeal of this approach, the majority concludes that these facts do not implicate the Double Jeopardy Clause. To reach this conclusion, the majority relies on our prior decisions that have permitted sentencers to consider at sentencing both prior convictions and other offenses that are related to the offense of conviction. The majority's reliance on these cases suggests that it has overlooked a distinction that I find critical to the resolution of the double jeopardy issue at hand.

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[1] After making offsetting adjustments for an aggravating role in the offense and for acceptance of responsibility, the District Court, pursuant to United States Sentencing Commission, Guidelines Manual § 5K1.1, departed downward by 148 months and sentenced petitioner to 144 months' imprisonment.

"Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 485 (1993). "One such important factor" to be considered in the sentencing calculus is "a defendant's prior convictions." *Nichols* v. *United States*, 511 U. S. 738, 747 (1994). Indeed, the prominent role played by past conduct in most guidelines-based sentencing regimes and in statutes that punish more harshly "habitual offenders" reveals the importance of this factor. As the majority notes, we have repeatedly upheld the use of such prior convictions against double jeopardy challenges. See *ante*, at 400 (citing cases). However, an understanding of the reason for our rejection of those challenges makes clear that those cases do not support the majority's conclusion.

Traditional sentencing practices recognize that a just sentence is determined in part by the character of the offense and in part by the character of the offender. Within this framework, the admission of evidence of an offender's past convictions reflects the longstanding notion that one's prior record is strong evidence of one's character. A recidivist should be punished more severely than a first offender because he has failed to mend his ways after a first conviction. As we noted in *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895), "'the punishment for the second [offense] is increased, because by his persistence in the perpetration of crime, [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence.'" See also *McDonald* v.

Massachusetts, 180 U. S. 311, 313 (1901) (commission of a second crime after conviction for first "show[s] that the man is an habitual criminal"). Thus, when a sentencing judge reviews an offender's prior convictions at sentencing, the judge is not punishing that offender a second time for his past misconduct, but rather is evaluating the nature of his individual responsibility for past acts and the likelihood that he will engage in future misconduct. Recidivist statutes are consistent with the Double Jeopardy Clause not because of the formalistic premise that one can only be punished or placed in jeopardy for the "offense of conviction," but rather because of the important functional understanding that the purpose of the prior conviction is to provide valuable evidence as to the offender's character. The majority's reliance on recidivist statutes is thus unavailing.

When the offenses considered at sentencing are somehow linked to the offense of conviction, the analysis is different. Offenses that are linked to the offense of conviction may affect both the character of the offense and the character of the offender. That is, even if he is not a recidivist, a person who commits two offenses should also be punished more severely than one who commits only one, in part because the commission of multiple offenses provides important evidence that the character of the offender requires special punishment, and in part because the character of the offense is aggravated by the commission of multiple offenses. Insofar as a sentencer relies on an offense as evidence of character, the Double Jeopardy Clause is not implicated. However, insofar as the sentencer relies on the offense as aggravation of the underlying offense, the Double Jeopardy Clause is necessarily implicated. At that point, the defendant is being punished for having committed the offense at issue, and not for what the commission of that offense reveals about his character. In such cases, the defendant has been "put in jeopardy" of punishment for the offense because he has in fact been punished for that offense.

Under many sentencing regimes, of course, it is difficult if not impossible to determine whether a given offense has affected the judge's assessment of the character of the offender, the character of the offense, or both. However, under the federal Sentencing Guidelines, the role played by each item in the sentencing calculus is perfectly clear. The Guidelines provide for specific sentencing adjustments for "criminal history" (*i. e.*, character of the offender) and for "relevant conduct" (*i. e.*, character of the offense). Under the Guidelines, therefore, an offense that is included as "relevant conduct" does not relate to the character of the offender (which is reflected instead by criminal history), but rather measures only the character of the offense. Even if all other mitigating and aggravating circumstances that shed light on an offender's character have been taken into account, the judge must sentence the offender for conduct that affects the seriousness of the offense.

The effect of this regime with respect to drug crimes provides a particularly striking illustration of why this mandatory consideration of relevant conduct implicates the Double Jeopardy Clause under anything but a formalistic reading of the Clause. Under the Guidelines, the severity of a drug offense is measured by the total quantity of drugs under all offenses that constitute "relevant conduct," regardless of whether those offenses were charged and proved at the guilt phase of the trial or instead proved at the sentencing hearing. For example, as I have noted above, petitioner's Guidelines range was determined by adding the quantity of marijuana to the quantity of cocaine (using the conversion formula set forth in the Guidelines). Petitioner has thus already been sentenced for an actual offense that includes the cocaine transactions that are the subject of the second indictment. Those transactions played precisely the same role in fixing his punishment as they would have if they had been the subject of a formal charge and conviction. The actual imposition of that punishment must surely demonstrate that petitioner was just as much in jeopardy for the offense as if he had been previously charged with it.

In sum, traditional sentencing practice does not offend the Double Jeopardy Clause because (1) past convictions are used only as evidence of the character of the offender, and not as evidence of the character of the offense, and (2) in traditional sentencing regimes, it is impossible to determine for what purpose the sentencer has relied on the relevant offenses. In my view, the Court's failure to recognize the critical distinction between the character of the offender and the character of the offense, as well as the Court's failure to recognize the change in sentencing practices caused by the Guidelines, cause it to overlook an important and obvious violation of the Double Jeopardy Clause.

III

Once this error in the majority's analysis is recognized, it becomes apparent that none of the cases on which the majority relies compels today's novel holding. In *Williams* v. *New York*, 337 U. S. 241 (1949), the Court held that the Due Process Clause did not prevent a sentencing judge from considering information contained in a presentence report. The Court's conclusion in *Williams* is consistent with my approach. The *Williams* Court repeatedly emphasized that the information in the presentence report provided the court with relevant information about the character of the defendant. For example, the Court noted that "the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." The Court continued: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Finally, the Court observed that "[t]oday's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders." *Id.*, at 247–248. Thus, the entire rationale of the *Williams* opinion focused on the importance of evidence that reveals the character of the offender. Not a word in Justice Black's opinion even suggests that if evidence adduced at sentencing were used to support a sentence for an offense more serious than the offense of conviction, the defendant would not have been placed in jeopardy for that more serious offense.[2]

The Court also relies on *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), suggesting that *McMillan* "necessarily impl[ies]" that consideration of "offender-specific information at sentencing" does not "result in 'punishment for such conduct.'" *Ante*, at 400–401. I believed at the time and continue to believe that *McMillan* was wrongly decided. However, even accepting the Court's conclusion in *McMillan*, that case does not support the majority's position. In *United States* v. *Halper*, 490 U. S. 435, 448 (1989), and *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 779–780 (1994), we emphatically rejected the proposition that punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial.

The case on which the Court places its principal reliance, *Williams* v. *Oklahoma*, 358 U. S. 576 (1959), is not controlling precedent. *Williams* was decided over 10 years before the Court held in *Benton* v. *Maryland*, 395 U. S. 784 (1969), that the Double Jeopardy Clause "should apply to the States through the Fourteenth Amendment." *Id.*, at 794. Thus, *Williams* did not even apply the Double Jeopardy Clause and instead applied only a "watered-down" version of due process, see *Benton*, 395 U. S., at 796. Moreover, in *Williams*, the State's discretionary sentencing scheme was entirely dissimilar to the federal Sentencing Guidelines, which require that "relevant conduct" be punished as if it had been proved beyond a reasonable doubt. The Court is therefore free to accept or reject the majority's reasoning in *Williams*.

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[2] The majority's reliance on *Nichols* v. *United States*, 511 U. S. 738 (1994), is similarly unavailing. In *Nichols*, the Court permitted the inclusion of an uncounseled misdemeanor conviction in the calculation of a defendant's criminal history. However, as I have noted above, the inclusion of an offense in criminal history for sentencing purposes treats that offense as relevant to the character of the offender rather than to the character of the offense.

The precise issue resolved in *Williams* is also somewhat different from that presented in today's case. In *Williams*, the petitioner committed two offenses, kidnaping and murder, arising out of the same incident. Though petitioner was convicted of capital murder, the judge imposed a sentence of life imprisonment. There is no reason to believe that the judge considered the kidnaping offense as relevant conduct in sentencing petitioner for the murder. Williams was then prosecuted for kidnaping. He did not raise a double jeopardy objection to the kidnaping prosecution—an objection that would have been comparable to petitioner's claim in this case regarding his cocaine prosecution. After Williams pleaded guilty to the kidnaping, the court considered the circumstances of the crime, including the murder, and imposed a death sentence. This Court affirmed. I agree with Justice Douglas' dissent that "petitioner was in substance tried for murder twice in violation of the guarantee against double jeopardy." 358 U. S., at 587. In any event, I surely would not apply the *Williams* Court's dubious reasoning to a federal sentence imposed under the Guidelines.[3]

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[3] I recognize that the Court in *Williams* stated that "the court's consideration of the murder as a circumstance involved in the kidnapping crime cannot be said to have resulted in punishing petitioner a second time for the same offense." 358 U. S., at 586. As I note in the text, I disagree with this statement. But even if it were correct, it does not dispose of petitioner's claim that he is being *prosecuted* for the cocaine offense a second time. The statement in *Williams* is directed only at the use of a prior conviction in a *subsequent sentencing proceeding;* it does not address whether the second *prosecution* is barred by the fact that the defendant has already been punished for the offense to be prosecuted.

Given the absence of precedent requiring the majority's unjust result, the case should be decided by giving effect to the text and purpose of the Double Jeopardy Clause. Petitioner received the sentence authorized by law for the offense of attempting to import cocaine. Petitioner is now being placed in jeopardy of a second punishment for the same offense. Requiring him to stand trial for that offense is a manifest violation of the Double Jeopardy Clause.

IV

Though the majority's holding in Parts I and II removes the Double Jeopardy Clause as a constitutional bar to petitioner's second punishment, the majority does recognize that the provisions of the Sentencing Guidelines reduce the likelihood of a second punishment as a practical matter. The Guidelines will generally ensure that the total sentence received in the two proceedings is the same sentence that would have been received had both offenses been brought in the same proceeding. Moreover, as the majority notes, the departure power is available to protect against unwarranted double punishment, see *ante*, at 405–406, as well as to prevent any possibility that "a second sentence for the same relevant conduct may deprive [a defendant] of the effect of the downward departure under § 5K1.1 of the Guidelines for substantial assistance to the Government," *ante*, at 406.[4]

The Court's statutory holding thus mitigates some of the otherwise unfortunate results of its constitutional approach. More importantly, the Court's statutory analysis is obviously correct. Accordingly, I join Part III of the Court's opinion.

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[4] Of course, the safeguards in the Guidelines do not eliminate the double jeopardy violation. The Double Jeopardy Clause protects against the burdens incident to a second trial, and not just against the imposition of a second punishment. Moreover, a "second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball* v. *United States*, 470 U. S. 856, 865 (1985).

V

In my view, the Double Jeopardy Clause precludes petitioner's subsequent prosecution for the cocaine offenses because petitioner was placed in jeopardy when he was punished for those offenses following his conviction for the marijuana offenses. I therefore join only Part III of the Court's opinion, and I respectfully dissent from the Court's judgment.

GUTIERREZ DE MARTINEZ ET AL. *v.* LAMAGNO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94–167. Argued March 22, 1995—Decided June 14, 1995

Invoking the federal court's jurisdiction based on diversity of citizenship, petitioners alleged in their complaint that they had suffered physical injuries and property damage as a result of an accident in Colombia caused by the negligence of respondent Lamagno, a federal employee. The United States Attorney, acting pursuant to the statute commonly known as the Westfall Act, 28 U. S. C. § 2679(d)(1), certified on behalf of the Attorney General that Lamagno was acting within the scope of his employment at the time of the episode. Ordinarily, upon such certification, the employee is dismissed from the action, the United States is substituted as defendant, and the case proceeds under the Federal Tort Claims Act (FTCA). But in this case, substitution would cause the action's demise: petitioners' claims arose abroad, and thus fell within an exception to the FTCA's waiver of the United States' sovereign immunity. And the United States' immunity would afford petitioners no legal ground to bring Lamagno back into the action. See *United States* v. *Smith*, 499 U. S. 160. Endeavoring to redeem their lawsuit, petitioners sought court review of the Attorney General's scope-of-employment certification, for if Lamagno was acting outside the scope of his employment, the action could proceed against him. However, the District Court held the certification unreviewable, substituted the United States for Lamagno, and dismissed the suit. The Fourth Circuit affirmed.

Held: The judgment is reversed, and the case is remanded.

23 F. 3d 402, reversed and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III, concluding that the Attorney General's scope-of-employment certification is reviewable in court. Pp. 423–434.

(a) As shown by the division in the lower courts and in this case, the Westfall Act is open to divergent interpretation on the question at issue. Two considerations weigh heavily in the Court's analysis. First, the Attorney General herself urges review, mindful that in cases of the kind petitioners present, the incentive of her delegate to certify is marked. Second, when a Government official's determination of a fact or circumstance—for example, "scope of employment"—is dispositive of a court controversy, federal judges traditionally proceed from the strong presumption that Congress intends judicial review. Review will not be cut off absent persuasive reason to believe that Congress so intended. No such reason is discernible here. Pp. 423–425.

(b) Congress, when it composed the Westfall Act, legislated against a backdrop of judicial review: courts routinely reviewed the local United States Attorney's scope-of-employment certification under the Act's statutory predecessor. The plain purpose of the Westfall Act was to override *Westfall* v. *Erwin*, 484 U. S. 292, which had added a "discretionary function" requirement, discrete from the scope-of-employment test, as a criterion for a federal officer's personal immunity. Although Congress thus wanted the employee's personal immunity to turn solely on the critical scope-of-employment inquiry, nothing tied to the Act's purpose shows an intent to commit that inquiry to the unreviewable judgment of the Attorney General or her delegate. Pp. 425–426.

(c) Construction of the Westfall Act as Lamagno urges—to deny to federal courts authority to review the Attorney General's scope-of-employment certification—would oblige this Court to attribute to Congress two highly anomalous commands. First, the Court would have to accept that, whenever the case falls within an exception to the FTCA, Congress has authorized the Attorney General to sit as an unreviewable judge in her own cause—able to block petitioners' way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale—or at least sparing the purse—of federal employees. This conspicuously self-serving interpretation runs counter to the fundamental principle that no one should be a judge in his own cause, and has been disavowed by the United States. Pp. 426–429.

(d) Second, and at least equally perplexing, Lamagno's proposed reading would cast Article III judges in the role of petty functionaries, persons required to rubber-stamp the decision of a scarcely disinterested executive officer, but stripped of capacity to evaluate independently whether that decision is correct. This strange course becomes all the more surreal when one adds to the scene the absence of any obligation on the part of the Attorney General's delegate to conduct proceedings, to give the plaintiff an opportunity to speak to the scope-of-employment question, to give notice that she is considering the question, or to give any explanation for her action. This Court resists ascribing to Congress an intention to place courts in the untenable position of having automatically to enter judgments pursuant to decisions they have no authority to evaluate. Pp. 429–430.

(e) The Westfall Act's language is far from clear. Section 2679(d)(2) provides for removal of the case from state to federal court and for substitution of the United States as defendant upon the Attorney General's certification. Section 2679(d)(2) states explicitly that "certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal.*" (Emphasis added.) Notably, § 2679(d)(2) contains no such statement with regard to substitution. The § 2679(d)(2) prescription thus tends in favor of judicial review. Counseling against review, however, is the commanding force of the word "shall": "Upon certification by the Attorney General . . . , any civil action or proceeding . . . *shall* be deemed an action against the United States . . . , and the United States *shall* be substituted as the party defendant." § 2679(d)(1) (emphasis added). As the statutory language is reasonably susceptible to divergent interpretations, the Court adopts the reading that accords with the presumption favoring judicial review and the tradition of court review of scope certifications, while avoiding the anomalies that attend foreclosure of review. Pp. 430–434.

GINSBURG, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., joined, and an opinion with respect to Part IV, in which STEVENS, KENNEDY, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 437. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 438.

Isidoro Rodriguez argued the cause and filed a brief for petitioners. *Malcolm L. Stewart* argued the cause for the federal respondents in support of petitioners pursuant to this Court's Rule 12.4. On the briefs were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Bender, Jeffrey P. Minear, Barbara L. Herwig,* and *Peter R. Maier.*

Andrew J. Maloney III argued the cause and filed a brief for respondent Lamagno.

Michael K. Kellogg, by invitation of the Court, 513 U. S. 1010, argued the cause and filed a brief as *amicus curiae* urging affirmance.

JUSTICE GINSBURG delivered the opinion of the Court, except as to Part IV.

When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort

Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . ." 28 U. S. C. § 2679(d)(1). Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the governance of the Federal Tort Claims Act (FTCA), ch. 753, 60 Stat. 812, 842. Generally, such cases unfold much as cases do against other employers who concede *respondeat superior* liability. If, however, an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party.

This case is illustrative. The Attorney General certified that an allegedly negligent employee "was acting within the scope of his . . . employment" at the time of the episode in suit. Once brought into the case as a defendant, however, the United States asserted immunity, because the incident giving rise to the claim occurred abroad and the FTCA excepts "[a]ny claim arising in a foreign country." 28 U. S. C. § 2680(k). Endeavoring to redeem their lawsuit, plaintiffs (petitioners here) sought court review of the Attorney General's scope-of-employment certification, for if the employee was acting outside the scope of his employment, the plaintiffs' tort action could proceed against him. The lower courts held the certification unreviewable. We reverse that determination and hold that the scope-of-employment certification is reviewable in court.

I

Shortly before midnight on January 18, 1991, in Barranquilla, Colombia, a car driven by respondent Dirk A. Lamagno, a special agent of the United States Drug Enforcement Administration (DEA), collided with petitioners' car. Petitioners, who are citizens of Colombia, allege that Lamagno was intoxicated and that his passenger, an unidentified woman, was not a federal employee.

Informed that diplomatic immunity shielded Lamagno from suit in Colombia, petitioners filed a diversity action against him in the United States District Court for the Eastern District of Virginia, the district where Lamagno resided. Alleging that Lamagno's negligent driving caused the accident, petitioners sought compensation for physical injuries and property damage.[1] In response, the local United States Attorney, acting pursuant to the Westfall Act, certified on behalf of the Attorney General that Lamagno was acting within the scope of his employment at the time of the accident. The certification, as is customary, stated no reasons for the U. S. Attorney's scope-of-employment determination.[2]

In the Westfall Act, Congress instructed:

> "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding

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[1] Petitioners also filed an administrative claim with the DEA pursuant to 84 Stat. 1284, as amended, 21 U. S. C. § 904, which authorizes settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad." The DEA referred the claim to the Department of Justice, which has not yet made a final administrative decision on that claim. As read by the Fourth Circuit, § 904 contains no express or implied provision for judicial review. App. 15.

[2] The certification read:

"I, Richard Cullen, United States Attorney for the Eastern District of Virginia, acting pursuant to the provisions of 28 U. S. C. § 2679, and by virtue of the authority vested in me by the Appendix to 28 C.F.R. § 15.3 (1991), hereby certify that I have investigated the circumstances of the incident upon which the plaintiff[s'] claim is based. On the basis of the information now available with respect to the allegations of the complaint, I hereby certify that defendant Dirk A. Lamagno was acting within the scope of his employment as an employee of the United States of America at the time of the incident giving rise to the above entitled action." App. 1–2.

> commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." § 2679(d)(1).

Thus, absent judicial review and court rejection of the certification, Lamagno would be released from the litigation; furthermore, he could not again be pursued in any damages action arising from the "same subject matter." § 2679(b)(1). Replacing Lamagno, the United States would become sole defendant.

Ordinarily, scope-of-employment certifications occasion no contest. While the certification relieves the employee of responsibility, plaintiffs will confront instead a financially reliable defendant. But in this case, substitution of the United States would cause the demise of the action: Petitioners' claims "ar[ose] in a foreign country," FTCA, 28 U. S. C. § 2680(k), and thus fell within an exception to the FTCA's waiver of the United States' sovereign immunity. See § 2679(d)(4) (upon certification, the action "shall proceed in the same manner as any action against the United States . . . and shall be subject to the limitations and exceptions applicable to those actions"). Nor would the immunity of the United States allow petitioners to bring Lamagno back into the action. See *United States* v. *Smith,* 499 U. S. 160 (1991).

To keep their action against Lamagno alive, and to avoid the fatal consequences of unrecallable substitution of the United States as the party defendant, petitioners asked the District Court to review the certification. Petitioners maintained that Lamagno was acting outside the scope of his employment at the time of the accident; certification to the contrary, they argued, was groundless and untrustworthy. Following Circuit precedent, *Johnson* v. *Carter,* 983 F. 2d 1316 (CA4) (en banc), cert. denied, 510 U. S. 812 (1993), the District Court held the certification unreviewable, substituted the United States for Lamagno, and dismissed petitioners' suit. App. 7–9. In an unadorned order, the Fourth Circuit affirmed. 23 F. 3d 402 (1994).

The Circuits divide sharply on this issue. Parting from the Fourth Circuit, most of the Courts of Appeals have held certification by the Attorney General or her delegate amenable to court review.[3] We granted certiorari to resolve the conflict, 513 U. S. 998 (1994),[4] and we now reverse the Fourth Circuit's judgment.

II

A

We encounter in this case the familiar questions: where is the line to be drawn; and who decides. Congress has firmly answered the first question. "Scope of employment" sets the line. See § 2679(b)(1); *United States* v. *Smith*, 499 U. S. 160 (1991). If Lamagno is inside that line, he is not subject to petitioners' suit; if he is outside the line, he is personally answerable. The sole question, then, is *who decides* on which side of the line the case falls: the local United

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[3] Compare *Johnson* v. *Carter*, 983 F. 2d 1316 (CA4) (en banc), cert. denied, 510 U. S. 812 (1993); *Garcia* v. *United States*, 22 F. 3d 609, suggestion for rehearing en banc granted, 22 F. 3d 612 (CA5 1994); *Aviles* v. *Lutz*, 887 F. 2d 1046, 1048–1049 (CA10 1989) (certification not reviewable), with *Nasuti* v. *Scannell*, 906 F. 2d 802, 812–814 (CA1 1990); *McHugh* v. *University of Vermont*, 966 F. 2d 67, 71–75 (CA2 1992); *Melo* v. *Hafer*, 912 F. 2d 628, 639–642 (CA3 1990), aff'd on other grounds, 502 U. S. 21 (1991); *Arbour* v. *Jenkins*, 903 F. 2d 416, 421 (CA6 1990); *Hamrick* v. *Franklin*, 931 F. 2d 1209 (CA7), cert. denied, 502 U. S. 869 (1991); *Brown* v. *Armstrong*, 949 F. 2d 1007, 1010–1011 (CA8 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F. 2d 740, 744–745 (CA9 1991); *S. J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F. 2d 1538, 1543 (1990), modified, 924 F. 2d 1555 (CA11), cert. denied, 502 U. S. 813 (1991); *Kimbro* v. *Velten*, 30 F. 3d 1501 (CADC 1994), cert. pending, No. 94–6703 (certification reviewable).

[4] The United States, in accord with petitioners, reads the Westfall Act to allow a plaintiff to challenge the Attorney General's scope-of-employment certification. We therefore invited Michael K. Kellogg to brief and argue this case, as *amicus curiae*, in support of the judgment below. 513 U. S. 1010 (1994). Mr. Kellogg accepted the appointment and has well fulfilled his assigned responsibility.

States Attorney, unreviewably or, when that official's decision is contested, the court. Congress did not address this precise issue unambiguously, if at all. As the division in the lower courts and in this Court shows, the Westfall Act is, on the "who decides" question we confront, open to divergent interpretation.

Two considerations weigh heavily in our analysis, and we state them at the outset. First, the Attorney General herself urges review, mindful that in cases of the kind petitioners present, the incentive of her delegate to certify is marked. Second, when a Government official's determination of a fact or circumstance—for example, "scope of employment"—is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from the "strong presumption that Congress intends judicial review." *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667, 670 (1986); see *id.*, at 670–673; *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967). Chief Justice Marshall long ago captured the essential idea:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States." *United States* v. *Nourse,* 9 Pet. 8, 28–29 (1835).

Accordingly, we have stated time and again that judicial review of executive action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories,* 387 U. S., at 140 (citing cases). No persuasive reason for restricting access to judicial review is discernible from the statutory fog we confront here.

B

Congress, when it composed the Westfall Act, legislated against a backdrop of judicial review. Courts routinely reviewed the local United States Attorney's scope-of-employment certification under the Westfall Act's statutory predecessor, the Federal Drivers Act, Pub. L. 87–258, § 1, 75 Stat. 539 (previously codified as 28 U. S. C. § 2679(d) (1982 ed.)). Similar to the Westfall Act but narrower in scope, the Drivers Act made the FTCA the exclusive remedy for motor vehicle accidents involving federal employees acting within the scope of their employment. 75 Stat. 539 (previously codified at 28 U. S. C. § 2679(b) (1982 ed.)). The Drivers Act, like the Westfall Act, had a certification scheme, though it applied only to cases brought in state court. Once the Attorney General or his delegate certified that the defendant driver was acting within the scope of employment, the case was removed to federal court and the United States was substituted as defendant. But the removal and substitution were subject to the federal court's control; a court determination that the driver was acting outside the scope of his employment would restore the case to its original status. See, *e. g., McGowan* v. *Williams*, 623 F. 2d 1239, 1242 (CA7 1980); *Seiden* v. *United States*, 537 F. 2d 867, 870 (CA6 1976); *Levin* v. *Taylor*, 464 F. 2d 770, 771 (CADC 1972).

When Congress wrote the Westfall Act, which covers federal employees generally and not just federal drivers, the legislators had one purpose firmly in mind. That purpose surely was not to make the Attorney General's delegate the final arbiter of "scope-of-employment" contests. Instead, Congress sought to override *Westfall* v. *Erwin*, 484 U. S. 292 (1988). In *Westfall*, we held that, to gain immunity from suit for a common-law tort, a federal employee would have to show (1) that he was acting within the scope of his employment, and (2) that he was performing a discretionary function. *Id.*, at 299. Congress reacted quickly to delete the "discretionary function" requirement, finding it an unwarranted judicial imposition, one that had "created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." § 2(a)(5), 102 Stat. 4563.

The Westfall Act trained on this objective: to "return Federal employees to the status they held prior to the *Westfall* decision." H. R. Rep. No. 100–700, p. 4 (1988). Congress was notably concerned with the *significance* of the scope-of-employment inquiry—that is, it wanted the employee's personal immunity to turn on that question alone. See § 2(b), 102 Stat. 4564 (purpose of Westfall Act is to "protect Federal employees from personal liability for common law torts committed within the scope of their employment"). But nothing tied to the purpose of the legislation shows that Congress meant the Westfall Act to commit the critical "scope-of-employment" inquiry to the unreviewable judgment of the Attorney General or her delegate, and thus to alter fundamentally the answer to the "who decides" question.

C

Construction of the Westfall Act as Lamagno urges—to deny to federal courts authority to review the Attorney General's scope-of-employment certification—would oblige us to attribute to Congress two highly anomalous commands. Not only would we have to accept that Congress, by its silence, authorized the Attorney General's delegate to make determinations of the kind at issue without any judicial check. At least equally perplexing, the proposed reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct.

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In the typical case, by certifying that an employee was acting within the scope of his employment, the Attorney General enables the tort plaintiff to maintain a claim for relief under the FTCA, a claim against the financially reliable United States. In such a case, the United States, by certifying, is acting *against* its financial interest, exposing itself to liability as would any other employer at common law who admits that an employee acted within the scope of his employment. See Restatement (Second) of Agency § 219 (1958).

The situation alters radically, however, in the unusual case—like the one before us—that involves an exception to the FTCA.[5] When the United States retains immunity from suit, certification disarms plaintiffs. They may not proceed against the United States, nor may they pursue the employee shielded by the certification. *Smith*, 499 U. S., at 166–167. In such a case, the certification surely does not qualify as a declaration against the Government's interest: it does not expose the United States to liability, and it shields a federal employee from liability.

But that is not all. The impetus to certify becomes overwhelming in a case like this one, as the Attorney General, in siding with petitioners, no doubt comprehends. If the local

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[5] Several of the FTCA's 13 exceptions are for cases in which other compensatory regimes afford relief. *Kosak* v. *United States*, 465 U. S. 848, 858 (1984) (one rationale for exceptions is "not extending the coverage of the [FTCA] to suits for which adequate remedies were already available"). See, *e. g.*, § 2680(c) (excluding "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty"); § 2680(d) (excluding "[a]ny claim for which a remedy is provided by" the Public Vessels Act, "relating to claims or suits in admiralty against the United States"); § 2680(e) (excluding "[a]ny claim arising out of an act or omission of any employee of the Government in administering the provisions of" the Trading with the Enemy Act); 2 L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies 13–8, 13–25, 13–43 to 13–44 (1995) (explaining these exclusions as cases in which other remedies are available).

United States Attorney, to whom the Attorney General has delegated responsibility, refuses certification, the employee can make a federal case of the matter by alleging a wrongful failure to certify. See § 2679(d)(3). The federal employee's claim is one the United States Attorney has no incentive to oppose for the very reason the dissent suggests, see *post*, at 448–449: Win or lose, the United States retains its immunity; hence, were the United States to litigate "scope of employment" against its own employee—thereby consuming the local United States Attorney's precious litigation resources—it would be litigating solely for the benefit of the plaintiff. Inevitably, the United States Attorney will feel a strong tug to certify, even when the merits are cloudy, and thereby "do a favor," *post*, at 448, both for the employee and for the United States as well, at a cost borne solely, and perhaps quite unfairly, by the plaintiff.

The argument for unreviewability in such an instance runs up against a mainstay of our system of government. Madison spoke precisely to the point:

> "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . ." The Federalist No. 10, p. 79 (C. Rossiter ed. 1961).

See *In re Murchison*, 349 U. S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *Spencer* v. *Lapsley*, 20 How. 264, 266 (1858) (recognizing statute accords with this maxim); see also Publius Syrus, Moral Sayings 51 (D. Lyman transl. 1856) ("No one should be judge in his own cause."); B. Pascal, Thoughts, Letters and Opuscules 182 (O. Wight transl. 1859) ("It is not permitted to the most equitable of men to be a judge in his own cause."); 1 W. Blackstone, Commentaries *91 ("[I]t is unreasonable that any man should determine his own quarrel.").

In sum, under Lamagno's reading of the congressional product at issue, whenever the case falls within an exception to the FTCA, the Attorney General sits as an unreviewable "judge in her own cause"; she can block petitioners' way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale—or at least sparing the purse—of federal employees. The United States, as we have noted, disavows this extraordinary, conspicuously self-serving interpretation. See *supra*, at 424, and n. 4. Recognizing that a United States Attorney, in cases of this order, is hardly positioned to act impartially, the Attorney General reads the law to allow judicial review.

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If Congress made the Attorney General's delegate sole judge, despite the apparent conflict of interest, then Congress correspondingly assigned to the federal court only rubber-stamp work. Upon certification in a case such as this one, the United States would automatically become the defendant and, just as automatically, the case would be dismissed. The key question presented—scope of employment—however contestable in fact, would receive no judicial audience. The court could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment. This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed, any proceeding. She need not give the plaintiff an opportunity to speak to the "scope" question, or even notice that she is considering the question. Nor need she give any explanation for her action.

Congress may be free to establish a compensation scheme that operates without court participation. Cf. 21 U. S. C. § 904 (authorizing executive settlement of tort claims that "arise in a foreign country in connection with the operations of the [DEA] abroad"). But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate. Cf. *United States* v. *Klein*, 13 Wall. 128, 146 (1872) (Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it"). We resist ascribing to Congress an intention to place courts in this untenable position.[6]

III

We return now, in more detail, to the statutory language to determine whether it overcomes the presumption favoring judicial review, the tradition of court review of scope certifications, and the anomalies attending foreclosure of review.

The certification, removal, and substitution provisions of the Westfall Act, 28 U. S. C. §§ 2679(d)(1)–(3),[7] work together

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[6] To the reality of an executive decisionmaker with scant incentive to act impartially, and a court used to rubber-stamp that decisionmaker's judgment, the dissent can only reply that these are "rare cases." *Post*, at 447. But this dispute centers solely on cases fitting the description "rare." See *supra*, at 422. It is hardly an answer to say that, in other cases, indeed in the great bulk of cases, court offices are not misused.

[7] Section 2679(d) provides in pertinent part:

"(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court to assure that, when scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court. To that end, the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court. § 2679(d)(3). If the action was initiated by the tort plaintiff in state court, the Attorney General, on the defendant-employee's petition, is to enter the case and may remove it to the federal court so that the scope determination can be made in the federal forum. *Ibid.*

When the Attorney General has granted certification, if the case is already in federal court (as is this case, because of the parties' diverse citizenship), the United States will be substituted as the party defendant. § 2679(d)(1). If the case was initiated by the tort plaintiff in state court,

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of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court."

the Attorney General is to remove it to the federal court, where, as in a case that originated in the federal forum, the United States will be substituted as the party defendant. § 2679(d)(2).

The statute next instructs that the "certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." *Ibid.* (emphasis added). The meaning of that instruction, in the view of petitioners and the Attorney General, is just what the emphasized words import. Congress spoke in discrete sentences in § 2679(d)(2) first of removal, then of substitution. Next, Congress made the Attorney General's certificate conclusive solely for purposes of removal, and notably not for purposes of substitution. It follows, petitioners and the Attorney General conclude, that the scope-of-employment judgment determinative of substitution can and properly should be checked by the court, *i. e.*, the Attorney General's scarcely disinterested certification on that matter is by statute made the first, but not the final word.

Lamagno's construction does not draw on the "certification . . . shall [be conclusive] . . . for purposes of removal" language of § 2679(d)(2).[8] Instead, Lamagno emphasizes the word "shall" in the statement: "Upon certification by the Attorney General . . . any civil action or proceeding . . . *shall* be deemed an action against the United States . . . , and the United States *shall* be substituted as the party defendant." § 2679(d)(1) (emphasis added). Any doubt as to the commanding force of the word "shall,"[9] Lamagno urges, is dispelled by this further feature: the Westfall Act's predecessor, the Federal Drivers Act, provided for court review of "scope-of-employment" certifications at the tort plaintiff's behest. Not only does the Westfall Act fail to provide for certification challenges by tort plaintiffs,[10] Lamagno underscores, but the Act prominently provides for court review of

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[8] In fact, under Lamagno's construction, this provision has no work to do, because Congress would have had no cause to insulate removal from challenge. If certification cannot be overturned, as Lamagno urges, then a firm basis for federal jurisdiction is ever present—the United States is a party, and the FTCA governs the case.

[9] Though "shall" generally means "must," legal writers sometimes use, or misuse, "shall" to mean "should," "will," or even "may." See D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402–403 (1992) ("shall" and "may" are "frequently treated as synonyms" and their mean-

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ing depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa."). For example, certain of the Federal Rules use the word "shall" to authorize, but not to require, judicial action. See, *e. g.*, Fed. Rule Civ. Proc. 16(e) ("The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.") (emphasis added); Fed. Rule Crim. Proc. 11(b) (A *nolo contendere* plea "*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.") (emphasis added).

[10] The dissent argues that Congress must have meant to foreclose judicial review of substitution when it omitted from the Westfall Act the Drivers Act language authorizing such review. See *post*, at 439–440, 443. But this language likely was omitted for another reason. It appeared in the Drivers Act provision authorizing the return of removed cases to state court: "Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit . . . is not available against the United States, the case shall be remanded to the State court." 75 Stat. 539 (previously codified at 28 U. S. C. § 2679(d) (1982 ed.)). Congress likely omitted this provision, the thrust of which was to authorize remands, because it had decided to foreclose needless shuttling of a case from one court to another—a decision evident also in the Westfall Act language making certification "conclusiv[e] . . . for purposes of removal." See § 2679(d)(2). The omission thus tells us little about Congress' will concerning review of substitution.

The dissent, moreover, draws inconsistent inferences from congressional silence. Omission of language authorizing review of *substitution*, the dissent argues, forecloses review. See *post*, at 439–440, 443. But omission of language authorizing review of *removal* is not sufficient to foreclose review; rather, to achieve this purpose, the dissent says, Congress took the further step of adding language in § 2679(d)(2) making review "conclusiv[e] . . . for purposes of removal." See *post*, at 444–445.

refusals to certify at the behest of defending employees. See § 2679(d)(3). Congress, in Lamagno's view, thus plainly intended the one-sided review, *i. e.*, a court check at the call of the defending employee, but no check at the tort plaintiff's call.

We recognize that both sides have tendered plausible constructions of a text most interpreters have found far from clear. See, *e. g.*, *McHugh* v. *University of Vermont*, 966 F. 2d 67, 72 (CA2 1992) ("[T]he text of the Westfall Act, viewed as a whole, is ambiguous."); *Arbour* v. *Jenkins*, 903 F. 2d 416, 421 (CA6 1990) ("[T]he scope certification provisions of the Westfall Act as a whole . . . [are] ambiguous regarding the reviewability of the Attorney General's scope certification."). Indeed, the United States initially took the position that the local United States Attorney's scope-of-employment certifications are conclusive and unreviewable but, on further consideration, changed its position. See Brief for United States 14, n. 4. Because the statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render. Under our reading, the Attorney General's certification that a federal employee was acting within the scope of his employment—a certification the executive official, in cases of the kind at issue, has a compelling interest to grant—does not conclusively establish as correct the substitution of the United States as defendant in place of the employee.

IV

Treating the Attorney General's certification as conclusive for purposes of removal but not for purposes of substitution, *amicus* ultimately argues, "raise[s] a potentially serious Article III problem." Brief for Michael K. Kellogg as *Amicus Curiae* 29. If the certification is rejected, because the federal court concludes that the employee acted outside the scope of his employment, and if the tort plaintiff and the employee resubstituted as defendant are not of diverse citizenship, *amicus* urges, then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction. This last-pressed argument by *amicus* largely drives the dissent. See *post*, at 440–443.

This case itself, we note, presents not even the specter of an Article III problem. The case was initially instituted in federal court; it was not removed from a state court. The parties' diverse citizenship gave petitioners an entirely secure basis for filing in federal court.

In any event, we do not think the Article III problem *amicus* describes is a grave one. There may no longer be a federal question once the federal employee is resubstituted as defendant, but in the category of cases *amicus* hypothesizes, there *was* a nonfrivolous federal question, certified by the local United States Attorney, when the case was removed to federal court. At that time, the United States was the defendant, and the action was thus under the FTCA. Whether the employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. See *supra*, at 430–432. Because a case under the Westfall Act thus "raises [a] questio[n] of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 493 (1983).

In adjudicating the scope-of-federal-employment question "at the very outset," the court inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee. Cf. *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966) (approving exercise of pendent jurisdiction when federal and state claims have "a common nucleus of operative fact" and would "ordinarily be expected to [be tried] all in one judicial proceeding"). "[C]onsiderations of judicial economy, convenience and fairness to litigants," *id.*, at 726, make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest.[11]

If, in preserving judicial review of scope-of-employment certifications, Congress "approach[ed] the limit" of federal-court jurisdiction, see *post*, at 441—and we do not believe it did—we find the exercise of federal-court authority involved here less ominous than the consequences of declaring certifications of the kind at issue uncontestable: The local United States Attorney, whose conflict of interest is apparent, would be authorized to make final and binding decisions insulating both the United States and federal employees like Lamagno from liability while depriving plaintiffs of potentially meritorious tort claims. The Attorney General, having weighed the competing considerations, does not read the statute to confer on her such extraordinary authority. Nor should we assume that Congress meant federal courts to accept cases only to stamp them "Dismissed" on an interested executive official's unchallengeable representation. The statute is fairly construed to allow petitioners to present to the District Court their objections to the Attorney General's scope-of-employment certification, and we hold that construction the more persuasive one.

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[11] The dissent charges that for Congress to allow cases like this one to open and finish in federal court, when brought there by the local United States Attorney, "implies a jurisdictional tenacity," *post*, at 443, and allows losers always to win, *post*, at 442. Under the dissent's abstract and unrelenting logic, it is a jurisdictional flight for Congress to assign to federal courts tort actions in which there is a genuine issue of fact whether a federal employee acted within the scope of his federal employment. The dissent's solution for this discrete class of cases: plaintiffs always lose. For the above-stated reasons, we disagree. See also Goldberg-Ambrose, Protective Jurisdiction of the Federal Courts, 30 UCLA L. Rev. 542, 549 (1983) ("If [the legal relationships on which the plaintiff necessarily relies] are federally created, even in small part, the claim should be treated as one that arises under federal law within the meaning of article III, independent of any protective jurisdiction theory.").

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For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons given in Parts I–III of the Court's opinion, which I join, I agree with the Court (and the Attorney General) that the Attorney General's scope-of-employment certifications in Westfall Act cases should be judicially reviewable. I do not join Part IV of the opinion, however. That discussion all but conclusively resolves a difficult question of federal jurisdiction that, as JUSTICE GINSBURG notes, is not presented in this case. *Ante,* at 435. In my view, we should not resolve that question until it is necessary for us to do so.

Of course, I agree with the dissent, *post,* at 441, that we ordinarily should construe statutes to avoid serious constitutional questions, such as that discussed in Part IV of the Court's opinion, when it is fairly possible to do so. See *United States* v. *X-Citement Video, Inc.,* 513 U. S. 64, 78 (1994); *Rust* v. *Sullivan,* 500 U. S. 173, 223–225 (1991) (O'CONNOR, J., dissenting). And I recognize that reversing the Court of Appeals' judgment in this case may make it impossible to avoid deciding that question in a future case. But even such an important canon of statutory construction as that favoring the avoidance of serious constitutional questions does not *always* carry the day. In this case, as described in detail by the Court, *ante,* at 423–434, several other important legal principles, including the presumption in favor of judicial review of executive action, *ante,* at 424, the prohibition against allowing anyone "'to be a judge in his own cause,'" *ante,* at 428 (quoting The Federalist No. 10, p. 79 (C. Rossiter ed. 1961) (J. Madison)), the peculiarity inherent in concluding that Congress has "assigned to the federal court only rubber-stamp work," *ante,* at 429, and the "sound general rule that Congress is deemed to avoid redundant drafting," *post,* at 444 (SOUTER, J., dissenting); *ante,* at 432, and n. 8, point in the other direction. The highly unusual confluence of those principles in this case persuades me that, despite the fact that the dissent's reading has the virtue of avoiding the possibility that a difficult constitutional question will arise in a future case, reversal is nonetheless the proper course.

JUSTICE SOUTER, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

One does not instinctively except to a statutory construction that opens the door of judicial review to an individual who complains of a decision of the Attorney General, when the Attorney General herself is ready to open the door. But however much the Court and the Attorney General may claim their reading of the Westfall Act to be within the bounds of reasonable policy, the great weight of interpretive evidence shows that they misread Congress's policy. And so I respectfully dissent.

The two principal textual statements under examination today are perfectly straightforward. "Upon certification by the Attorney General . . . any civil action or proceeding . . . shall be deemed an action against the United States . . . , and the United States shall be substituted as the party defendant." 28 U. S. C. §2679(d)(1); see also §2679(d)(4) ("Upon certification, any action or proceeding . . . shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] . . ."). Notwithstanding the Court's observation that some contexts can leave the word "shall" a bit slippery, *ante,* at 432–433, n. 9, we have repeatedly recognized the normally uncompromising directive that it carries. See *United States* v. *Monsanto,* 491 U. S. 600, 607 (1989); *Anderson* v. *Yungkau,* 329 U. S. 482, 485 (1947); see also *Griggs* v. *Provident Consumer Discount Co.,* 459 U. S. 56, 61 (1982) *(per curiam); Association of Civilian Technicians* v. *FLRA,* 22 F. 3d 1150, 1153 (CADC 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). There is no hint of wobbling in the quoted language,[1] and the normal meaning of its plain provisions that substitution is mandatory on certification is the best evidence of the congressional intent that the Court finds elusive (*ante,* at 425, 426). That normal meaning and manifest intent is confirmed by additional textual evidence and by its consonance with normal jurisdictional assumptions.

We would not, of course, read "shall" as so uncompromising if the Act also included some express provision for review at the behest of the tort plaintiff when the Attorney General certifies that the acts charged were inside the scope of a defendant employee's official duties. But the Westfall Act has no provision to that effect, and the very fact that its predecessor, the Federal Drivers Act, Pub. L. 87–258, 75 Stat. 539, combined "shall" with just such authorization for review at the will of a disappointed tort plaintiff, *ibid.* (previously codified at 28 U. S. C. § 2679(d) (1982 ed.)),[2] makes the absence of a like provision from the Westfall Act especially good evidence that Congress meant to drop this feature from the system, leaving "shall" to carry its usual unconditional message. See *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in . . . earlier Acts indicates that a change of law was intended"); 2A N. Singer, Sutherland on Statutory Construction §51.02, p. 454 (4th ed. 1984). That conclusion gains further force from the presence in the Westfall Act of an express provision for judicial review at the behest of a defending employee, when the Attorney General refuses to certify that the acts fell within the scope of Government employment. See 28 U. S. C. §2679(d)(3) ("[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment"). Providing authority in one circumstance but not another implies an absence of authority in the statute's silence. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); see also *United States* v. *Naftalin*, 441 U. S. 768, 773–774 (1979).

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[1] The Court provides two examples from the Federal Rules in which the circumstances under which action "shall" be taken are limited by use of the word "only." *Ante,* at 432–433, n. 9. There is, of course, no similar language of limitation in § 2679(d)(1). The only prerequisite for substitution under the Westfall Act is certification.

[2] The Drivers Act provided for certification only in cases originating in state court, and judicial review was perforce limited to those cases. See 75 Stat. 539 (previously codified at 28 U. S. C. § 2679(d) (1982 ed.)).

Even if these textually grounded implications were not enough to confirm a plain reading of the text and decide the case, an anomalous jurisdictional consequence of the Court's position should be enough to warn us away from treating the Attorney General's certification as reviewable. The Court recognizes that there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system: "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," 28 U. S. C. § 2679(d)(2). As the principal opinion concedes, then, *ante*, at 435, its reading supposes that Congress intended federal courts to retain jurisdiction over state-law tort claims between nondiverse parties even after determining that the Attorney General's certification (and thus the United States's presence as the defendant) was improper. But there is a serious problem, on the Court's reasoning, in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way. Although we have declined recent invitations to define the outermost limit of federal-court jurisdiction authorized by the "Arising Under" Clause of Article III of the Constitution,[3] see *Mesa* v. *California*, 489 U. S. 121, 136–137 (1989); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480 (1983), on the Court's reading this statute must at the very least approach the limit, if it does not cross the line. This, then, is just the case for adhering to the Court's practice of declining to construe a statute as testing this limit when presented with a sound alternative. *Mesa* v. *California*, *supra*, at 137, citing *Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979).

The principal opinion departs from this practice, however. Instead, it looks for jurisdictional solace in the theory that once the Attorney General has issued a scope-of-employment certification, the United States's (temporary) appearance as the sole defendant suffices forever to support jurisdiction in federal court, even if the district court later rejects the Attorney General's certification and resubstitutes as defendant the federal employee first sued in state court. *Ante*, at 434–435. Whether the employee was within the scope of his federal employment, the principal opinion reasons, is itself a sufficient federal question to bring the case into federal court, and "'considerations of judicial economy, convenience and fairness to litigants,'" *ante,* at 436, quoting *Mine Workers* v. *Gibbs,* 383 U. S. 715, 726 (1966), are sufficient to keep it there even after a judicial determination that the United States is not the proper defendant.

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[3] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U. S. Const., Art. III, § 2, cl. 1.

But the fallacy of this conclusion appears as soon as one recalls the fact that substitution of the United States as defendant (which establishes federal-question jurisdiction) is exclusively dependant on the scope-of-employment certification. The challenge to the certification is thus the equivalent of a challenge to the essential jurisdictional fact that the United States is a party, and the federal court's jurisdiction to review scope of employment (on the principal opinion's theory) is merely an example of any court's necessary authority to rule on a challenge to its own jurisdiction to try a particular action. To argue, as the principal opinion does, that authority to determine scope of employment justifies retention of jurisdiction whenever evidence bearing on jurisdiction and liability overlaps, is therefore tantamount to saying the authority to determine whether a court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge. It simply obliterates the distinction between the authority to determine jurisdiction and the jurisdiction that is the subject of the challenge, and the party whose jurisdictional claim was challenged will never lose: litigating the question whether an employee's allegedly tortious acts fall within the scope of employment will, of course, always require some evidence to show what the acts were. Accordingly, there will always be overlap between evidence going to the scope-of-employment determination and evidence bearing on the underlying liability claimed by the plaintiff, and for this reason federal-question jurisdiction in these cases becomes inevitable on the Court's view. The right to challenge it therefore becomes meaningless, as does the very notion of jurisdictional limitation. The Court's cure for the jurisdictional disease is thus to kill the concept of federal-question jurisdiction as a limit on what federal courts may entertain.

It would never be sound to attribute such an aberrant concept of federal-question jurisdiction to Congress; it is impossible to do so when we realize that Congress expressly provided that when a federal court considers a challenge to the Attorney General's refusal to certify (raised by an employee-defendant) and finds the act outside the scope of employment, a case that originated in a state court must be remanded back to the state court. See 28 U. S. C. § 2679(d)(3). In such a case, there will have been just as much overlap of jurisdictional evidence and liability evidence as there will be when the jurisdictional issue is litigated at the behest of a plaintiff (as here) who contests a scope-of-employment certification. If Congress thought the federal court should retain jurisdiction when it is revealed that none exists in this latter case, it should have thought so in the former. But it did not, and the reason it did not is obvious beyond any doubt. It assumed a federal court would never be in the position to retain jurisdiction over an action for which a tort plaintiff has shown there is no federal-question basis, and Congress was entitled to assume this, because it had provided that a certification was conclusive.

In sum, the congressional decision to make the Attorney General's certification conclusive was couched in plain terms, whose plain meaning is confirmed by contrasting the absence of any provision for review with just such a provision in the predecessor statute, and with an express provision for review of a refusal to certify, contained in the Westfall Act itself. The Court's contrary view implies a jurisdictional tenacity that Congress expressly declined to assert elsewhere in the Act, and invites a difficult and wholly unnecessary constitutional adjudication about the limits of Article

III jurisdiction. These are powerful reasons to recognize the unreviewability of certification, and the Court's contrary arguments fail to measure up to them.

The Court raises three counterpoints to a straightforward reading of the Act. First, it suggests that language in § 2679(d)(2) negatively implies that Congress intended to authorize judicial review of scope-of-employment certifications, and that, in fact, the straightforward reading of the statute results in a drafting redundancy. Second, the Court claims that the straightforward reading creates an oddity by limiting the role of federal courts in certain cases. Finally, the Court invokes the presumption against judging one's self.

The redundancy argument, it must be said, is facially plausible. It begins with the sound general rule that Congress is deemed to avoid redundant drafting, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988); see *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 196–197 (1985), from which it follows that a statutory interpretation that would render an express provision redundant was probably unintended and should be rejected. Applying that rule here, the argument is that if certification by the Attorney General conclusively establishes scope of employment for substitution purposes, then there is no need for the final sentence in § 2679(d)(2), that certification "shall conclusively establish scope of office or employment for purposes of removal" in cases brought against federal employees in state court. If certification is conclusive as to substitution it will be equally conclusive as to removal, since the federal defendant will necessarily be entitled to claim jurisdiction of a federal court under 28 U. S. C. § 1346(b). See *ante,* at 432, n. 8. Accordingly, the Court suggests the provision making certification conclusive for purposes of removal must have greater meaning; it must carry the negative implication that certification is not conclusive for purposes of substitution. *Ante,* at 432.

Sometimes, however, there is an explanation for redundancy, rendering any asserted inference from it too shaky to be trusted. Cf. *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 459 (1993). That is the case with the provision that certification is conclusive on the issue of removal from state to federal court. The explanation takes us back to the Westfall Act's predecessor, the Federal Drivers Act, 75 Stat. 539, which was superseded upon passage of the current statute, Pub. L. 100–694, 102 Stat. 4563–4567. The Drivers Act made the FTCA the exclusive source of remedies for injuries resulting from the operation of any motor vehicle by a federal employee acting within the scope of his employment. 28 U. S. C. §2679(b) (1982 ed.). Like the Westfall Act, the Drivers Act authorized the Attorney General to certify that a federal employee sued in state court was acting within the scope of employment during the incident allegedly giving rise to the claim, and it provided in that event for removal to the federal system, as well as for substitution of the United States as the defendant. §2679(d). Unlike the Westfall Act, however, the Drivers Act explicitly directed district courts to review, "on a motion to remand held before a trial on the merits," whether any such case was "one in which a remedy by suit . . . is not available against the United States." *Ibid.* The district courts and the courts of appeals routinely read this language to permit district courts to hear motions to remand challenging the Attorney General's scope-of-employment determination. See *McGowan* v. *Williams*, 623 F. 2d 1239, 1242 (CA7 1980); *Van Houten* v. *Ralls*, 411 F. 2d 940, 942 (CA9), cert. denied, 396 U. S. 962 (1969); *Daugherty* v. *United States*, 427 F. Supp. 222, 223–224 (WD Pa. 1977); accord, *Seiden* v. *United States*, 537 F. 2d 867, 869 (CA6 1976); *Levin* v. *Taylor*, 464 F. 2d 770, 771 (CADC 1972). Given the express permissibility of a motion to remand in order to raise a postremoval challenge to certification under the Drivers Act, when the old Act was superseded, and challenges to certification were eliminated, Congress could sensibly have seen some practical value in the redundancy of making it clear beyond question that the old practice of considering scope of employment on motions to remand was over.[4]

How then does one assess the force of the redundancy? On my plain reading of the statute, one may take it as an understandable inelegance of drafting. One could, in the alternative, take it as some confirmation for the Court's view, even though the Court's view brings with it both a jurisdictional anomaly and the consequent certainty of a serious constitutional question. Is it not more likely that Congress would have indulged in a little redundancy, than have meant to foist such a pointless need for constitutional litigation onto the federal courts? Given the choice, inelegance may be forgiven.

The Court's second counterpoint is that we should be reluctant to read the Westfall Act in a way that leaves a district court without any real work to do. The Court suggests that my reading does just that in cases like this one, because the district court's sole function after the Attorney General has issued a scope-of-employment certification is to enter an order of dismissal. *Ante*, at 429. Of course, in the bulk of cases with an Attorney General's certification, the sequence envisioned by the Court will never materialize. Even though a district court may not review the scope-of-employment determination, it will still have plenty of work to do in the likely event that either liability or amount of damages is disputed, or the United States's claim to immunity under 28 U. S. C. § 2680 turns on disputed facts. Only in those rare cases presenting a claim to federal immunity too airtight for the plaintiff to challenge will the circumstance identified by the Court even occur. It is hard to find any significance in the fact that now and then a certification will relieve a federal court of further work, given the straightforward and amply confirmed provision for conclusiveness.

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[4] The Court concludes that the provision for review of certification was omitted because it was joined with the provision for remand in the Drivers Act. *Ante*, at 433, n. 10. On a matter of this substance, the explanation does not give Congress credit for much intellectual discrimination. The same footnote also sells this dissent a bit short: we have no need to argue that omission of any provision to review scope of employment, in isolation, would conclusively have foreclosed review, and we have made the very point that a failure to provide for conclusiveness of removal would not have left that issue in doubt; on each point, the various items of interpretive evidence supplied by the text and by textual comparison with the Drivers Act are to be read together in pointing to whatever judgment they support.

The Court's final counterpoint to plain reading relies heavily on "the strong presumption that Congress intends judicial review of administrative action," citing a line of cases involving judicial challenges to regulations claimed to be outside the statutory authority of the administrative agencies that promulgated them. See *ante*, at 424–425, citing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–673 (1986); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). It is, however, a fair question whether this presumption, usually applied to permit review of agency regulations carrying the force and effect of law, should apply with equal force to a Westfall Act certification. The very narrow factual determination committed to the Attorney General's discretion is related only tangentially, if at all, to her primary executive duties; she determines only whether a federal employee, who will probably not even be affiliated with the Justice Department, acted within the scope of his employment on a particular occasion. This function is far removed from the agency action that gave rise to the presumption of reviewability in *Bowen*, *supra*, at 668–669, in which the Court considered whether Congress provided the Secretary of Health and Human Services with nonreviewable authority to promulgate certain Medicare distribution regulations, and in *Abbott Laboratories*, *supra*, at 138–139, in which the Court considered whether Congress provided the Secretary of Health, Education and Welfare with nonreviewable authority to promulgate certain prescription drug labeling regulations.

The Court's answer that the presumption of reviewability should control this case rests on the invocation of a different, but powerful, principle, that no person may be a judge in his own cause. *Ante,* at 427–429. But this principle is not apt here. The Attorney General (who has delegated her Westfall Act responsibilities to the United States Attorneys, 28 CFR § 15.3(a) (1994)) is authorized to determine when any one of nearly three million federal employees was acting within the scope of authority at an allegedly tortious moment. She will characteristically have no perceptible interest in the effect of her certification decision, except in the work it may visit on her employees or the liability it may ultimately place on the National Government (each of which considerations could only influence her to deny certification subject to the employee's right to challenge her). And even where she certifies under circumstances of the Government's immunity, as here, she does not save her employer, the United States, from any liability it would face in the absence of certification; if she refused to certify, the Government would remain as free of exposure as if she issued a certification. The most that can be claimed is that when the Government would enjoy immunity it would be easy to do a favor for a federal employee by issuing a certification. But at this point the possibility of institutional self-interest has simply become *de minimis,*[5] and the likelihood of improper influence has become too attenuated to analogize to the case in which the interested party would protect himself by judging his own cause or otherwise take the law into his own hands in disregard of established legal process. Although the Court quotes at length from the traditional condemnations of self-interested judgments, *ante*, at 428–429, its citations would be on point here only if the employee were issuing the certification. But of course, the employee is not the one who does it, and the Attorney General plainly lacks the kind of self-interest that "'would certainly bias [her] judgment, and, not improbably, corrupt [her] integrity. . . .'" *Ante*, at 428, quoting The Federalist No. 10, p. 79 (C. Rossiter ed. 1961) (J. Madison).

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[5] The Court tries to convert this minimal influence into a "conflict of interest," *ante,* at 436, derived from an "impetus to certify [that is] overwhelming," *ante,* at 427, said to arise from a United States Attorney's fear that a Government employee would contest a refusal to certify and force the United States Attorney to litigate the issue. This suggestion will appear plausible or not depending on one's view of the frailty of United States Attorneys. We have to doubt that the Attorney General sees her United States Attorneys as quite so complaisant, and if Congress had thought that the Government's lawyers would certify irresponsibly just to avoid preparing for a hearing it would surely have retained the Drivers Act's provision for review of certification.

In any event, even when this presumption is applicable, it is still no more than a presumption, to be given controlling effect only if reference to "specific language or specific legislative history" and "inferences of intent drawn from the statutory scheme as a whole," *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349 (1984), leave the Court with "substantial doubt" as to Congress's design, *id.*, at 351. There is no substantial doubt here. The presumption has no work to do.

I would affirm.

OKLAHOMA TAX COMMISSION *v.* CHICKASAW NATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 94–771. Argued April 24, 1995—Decided June 14, 1995

Respondent Chickasaw Nation (Tribe) filed this action to stop Oklahoma from enforcing several state taxes against the Tribe and its members. Pertinent here, the District Court held for the State on the motor fuels tax question, and largely for the Tribe on the income tax issue. The Court of Appeals ruled for the Tribe and its members on both issues, determining: (1) that, without congressional authorization, the State could not impose a motor fuels tax on fuel sold by the Tribe at its retail stores on tribal trust land; and (2) that the State could not tax the wages of tribal members employed by the Tribe, even if they reside outside Indian country.

Held:

1. Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. Pp. 455–462.

(a) The Court declines to address the State's argument, raised for the first time in its brief on the merits, that the Hayden-Cartwright Act expressly authorizes States to tax motor fuel sales on Indian reservations. Pp. 456–457.

(b) When a State attempts to levy a tax directly on Indian tribes or their members inside Indian country, the proper approach is not, as the State contends, to weigh the relevant state and tribal interests. Rather, a more categorical approach should be employed: Absent clear congressional authorization, a State is without power to tax reservation lands and reservation Indians. The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of the tax, for if it is a tribe or tribal members inside Indian country, the tax cannot be enforced absent federal legislation permitting the impost. The inquiry proper in this case is whether the fuels tax rests on the Tribe as retailer, or on the wholesaler who sells to the Tribe or the consumer who buys from the Tribe. Judicial focus on legal incidence accords due deference to Congress' lead role in evaluating state taxation as it bears on Indian tribes and tribal members. A "legal incidence" test, furthermore, provides a reasonably bright-line standard accommodating the reality that tax administration requires predictability. And a State unable to enforce its tax because the legal incidence falls on tribes or on Indians within Indian country, generally is free to amend its law to shift the tax's legal incidence. Pp. 457–460.

(c) The Court of Appeals' ruling that the fuels tax's legal incidence rests on the retailer is reasonable. The state legislation does not expressly identify who bears the tax's legal incidence. Nor does it contain a provision requiring that the tax be passed on to consumers. In the absence of such dispositive language, the question is one of fair interpretation of the taxing statute as written and applied. In this case, the fuels tax law's language and structure indicate that the tax is imposed on fuel retailers. Pp. 461–462.

2. Oklahoma may tax the income of tribal members who work for the Tribe but reside in the State outside Indian country. The Court of Appeals' holding to the contrary conflicts with the well-established principle of interstate and international taxation that a jurisdiction may tax *all* the income of its residents, even income earned outside the taxing jurisdiction. The exception that the Tribe would carve out of the State's taxing authority gains no support from the rule that Indians and tribes are generally immune from state taxation, as this principle does not operate outside Indian country. In addition, the Treaty of Dancing Rabbit Creek, which guarantees the Tribe and its members that "no Territory or State shall ever have a right to pass laws for the [Tribe's] government," provides only for the Tribe's sovereignty within Indian country and does not confer super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits. Nor can the Treaty be read to incorporate the repudiated doctrine that an income tax imposed on government employees should be treated as a tax on the government. The Treaty's signatories likely gave no thought to a State's authority to tax income of tribal members living in the State's domain, since the Treaty's purpose was to move the Tribe to unsettled land not then within a State. Moreover, if that doctrine were to apply, it would require exemption for nonmember as well as tribal member employees of the Tribe. Pp. 462–467.

31 F. 3d 964, affirmed in part, reversed in part, and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, O'CONNOR, and SOUTER, JJ., joined, *post*, p. 468.

Charles Rothfeld argued the cause for petitioner. With him on the briefs were *Gary A. Winters, Stanley Johnston,* and *David Allen Miley.*

Dennis W. Arrow argued the cause for respondent. With him on the briefs was *Bob Rabon.*

Paul A. Engelmayer argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Schiffer,* and *Deputy Solicitor General Kneedler.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the taxing authority of the State of Oklahoma over the Chickasaw Nation (Tribe) and its members.[1] We take up two questions: (1) May Oklahoma impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land; (2) May Oklahoma impose its income tax upon members of the Chickasaw Nation who are employed by the Tribe but who reside in the State outside Indian country.[2]

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*Briefs of *amici curiae* urging reversal were filed for the State of South Dakota et al. by *Mark W. Barnett,* Attorney General of South Dakota, and *Lawrence E. Long,* Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Daniel E. Lungren* of California, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Heidi Heitkamp* of North Dakota, *Theodore R. Kulongoski* of Oregon, *Jan Graham* of Utah, *James E. Doyle* of Wisconsin, and *Joseph B. Meyer* of Wyoming; and for the Petroleum Marketers Association of America et al. by *Robert S. Bassman* and *Alphonse M. Alfano.*

Briefs of *amici curiae* urging affirmance were filed for the Cherokee Nation by *David A. Mullon, Jr.,* and *L. Susan Work;* for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Kim Jerome Gottschalk, Rodney B. Lewis, Bertram Hirsch, Doug Nash, Carol Barbero, Patrice Kunesh,* and *Christopher D. Quale;* for the Choctaw Nation by *Glenn M. Feldman;* for the Navajo Nation Oil and Gas Co., Inc., by *Paul E. Frye* and *Wayne H. Bladh;* and for the Sac and Fox Nation by *G. William Rice* and *Gregory H. Bigler.*

[1] For the Court's most recent encounters with questions of state authority to tax Indian Tribes and their members, and tribal immunity from state taxation, see *Department of Taxation and Finance of N. Y.* v. *Milhelm Attea & Bros.,* 512 U. S. 61 (1994); *Oklahoma Tax Comm'n* v. *Sac and Fox Nation,* 508 U. S. 114 (1993); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation,* 502 U. S. 251 (1992); *Oklahoma Tax*

We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country. We further hold, however, that Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country. The Treaty between the United States and the Tribe, which guarantees the Tribe and its members that "no Territory or State shall ever have a right to pass laws for the government of" the Chickasaw Nation, does not displace the rule, accepted interstate and internationally, that a sovereign may tax the entire income of its residents.

I

The Chickasaw Nation, a federally recognized Indian Tribe, commenced this civil action in the United States District Court for the Eastern District of Oklahoma, to stop the State of Oklahoma from enforcing several state taxes against the Tribe and its members.[3] Pertinent here, the District

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Comm'n v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991).

[2] "Indian country," as Congress comprehends that term, see 18 U. S. C. § 1151, includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox*, 508 U. S., at 123.

[3] In addition to the motor fuels and income taxes before us, the Tribe's complaint challenged motor vehicle excise taxes on Tribe-owned vehicles, retail sales taxes on certain purchases by the Tribe for its own use, and

Court, ruling on cross-motions for summary judgment, held for the State on the motor fuels tax imposition and largely for the Tribe on the income tax issue. The Court of Appeals for the Tenth Circuit ruled for the Tribe and its members on both issues: It held that the State may not apply the motor fuels tax to fuel sold by the Tribe's retail stores, and, further, that the State may not tax the wages of members of the Chickasaw Nation who work for the Tribe, even if they reside outside Indian country. 31 F. 3d 964 (1994).

Concerning the motor fuels tax, the Tenth Circuit disapproved the District Court's "balancing of the respective tribal and state interests" approach. *Id.*, at 972. The legal incidence of the tax, the Court of Appeals ruled, is the key concept. That incidence, the Tenth Circuit determined, falls directly on fuel retailers—here, on the Tribe, due to its operation of two convenience stores that sell fuel to tribal members and other persons. Oklahoma's imposition of its fuels tax on the Tribe as retailer, the Court of Appeals concluded, "conflicts with . . . the traditional scope of Indian sovereign authority." *Ibid.* Because the State asserted no congressional authorization for its exaction, the Tenth Circuit declared the fuels tax preempted.

Oklahoma's income tax, in the Court of Appeals' view, could not be applied to *any* tribal member employed by the Tribe;[4] residence, the Tenth Circuit said, was "simply not relevant to [its] determination." *Id.*, at 979. The Court of Appeals relied on the provision of the Treaty of Dancing

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sales taxes on 3.2% beer sold at the Tribe's two convenience stores, as well as tax warrants issued against officers of the Tribe. In the course of litigation, Oklahoma apparently decided not to contest the Tribe's claims regarding the vehicle and retail sales taxes, and withdrew the warrants; the United States Court of Appeals for the Tenth Circuit affirmed the District Court's grant of summary judgment for the State on the 3.2% beer tax, and the Tribe has not sought our review of that issue.

[4] In a ruling not before us, see Brief for Respondent 47, the Court of Appeals upheld application of Oklahoma's income tax to Chickasaw Nation employees who are not members of the Tribe.

Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333–334, that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants." To this treaty language, the Tenth Circuit applied "the general rule that '[d]oubtful expressions are to be resolved in favor of' the Indians." 31 F. 3d, at 978 (quoting *McClanahan* v. *Arizona Tax Comm'n,* 411 U. S. 164, 174 (1973)). The Court of Appeals also noted that it had endeavored to "rea[d] the treaty as the Indians [who signed it] would have understood it." 31 F. 3d, at 979.

We granted the State's petition for certiorari, 513 U. S. 1071 (1995), and now (1) affirm the Court of Appeals' judgment as to the motor fuels tax, and (2) reverse that judgment as to the income tax applied to earnings of tribal members who work for the Tribe but reside in the State outside Indian country.

II

The Tribe contends, and the Tenth Circuit held, that Oklahoma's fuels tax[5] is levied on retailers, not on distributors or consumers. The respect due to the Chickasaw Nation's sovereignty, the Tribe maintains, means Oklahoma—absent congressional permission—may not collect its tax for fuel supplied to, and sold by, the Tribe at its convenience stores. In support of the tax immunity it asserts, the Tribe recalls our reaffirmations to this effect: "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe,* 471 U. S. 759, 764 (1985); see also, *e. g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

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[5] According to the State's Tax Commission, Oklahoma imposes fuels tax at the rate of 17 cents per gallon for gasoline and 14 cents per gallon for diesel fuel. Brief for Petitioner 2–3; see Okla. Stat., Tit. 68, §§ 502, 502.2, 502.4, 502.6, 516, 520, 522 (1991) (gasoline); §§ 502.1, 502.3, 502.5, 502.7, 522.1 (diesel fuel).

In response, Oklahoma urges that Indian tribes and their members are not inevitably, but only "'generally,'" immune from state taxation. Brief for Petitioner 19 (quoting *Blackfeet Tribe*, 471 U. S., at 764). At least as to some aspects of state taxation, Oklahoma asserts, an approach "balancing the state and tribal interests" is in order. Brief for Petitioner 17. Even if the legal incidence of the fuels tax falls on the Tribe (as retailer), Oklahoma concludes, tax immunity should be disallowed here because "the state interest supporting the levy is *compelling*, . . . the tribal interest is *insubstantial*, and . . . the state tax would have no effect on 'tribal governance and self-determination.'" *Id.*, at 22 (emphasis in original).

In the alternative, Oklahoma argues that the Court of Appeals "erred in holding that the legal incidence of the fuel tax falls on the retailer." *Id.*, at 10. Moreover, the State newly contends, even if the fuels tax otherwise would be impermissible, Congress, in the 1936 Hayden-Cartwright Act, 4 U. S. C. § 104, expressly permitted state taxation of reservation activity of this type. Brief for Petitioner 23–24.

We set out first our reason for refusing to entertain at this late date Oklahoma's argument that the Hayden-Cartwright Act expressly permits state levies on motor fuels sold on Indian reservations. We then explain why we agree with the Tenth Circuit on the Tribe's exemption from Oklahoma's fuels tax.

A

On brief, the State points out—for the first time in this litigation—that the Hayden-Cartwright Act, 4 U. S. C. § 104, expressly authorizes States to tax motor fuel sales on "United States military or other reservations." § 104(a). The Act's word "reservations," Oklahoma maintains, encompasses Indian reservations. Brief for Petitioner 23–24. We decline to address this question of statutory interpretation.

The State made no reference to the Hayden-Cartwright Act in the courts of first and second instance. And even though the Court of Appeals flagged the Act's possible relevance,[6] Oklahoma did not mention this 1936 legislation in its petition for certiorari. Nor is Oklahoma's newly discovered claim of vintage legislative authorization "fairly included"[7] in the question the State tendered for our review: "Whether principles of federal pre-emption or Indian sovereignty preclude a State from imposing a tax on motor fuel sold by an Indian tribe . . . . ?" Pet. for Cert. (i). As a court of review, not one of first view, we will entertain issues withheld until merits briefing "'only in the most exceptional cases.'" *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (citation omitted). This case does not fit that bill.

B

Assuming, then, that Congress has not expressly authorized the imposition of Oklahoma's fuels tax on fuel sold by the Tribe, we must decide if the State's exaction is nonetheless permitted. Oklahoma asks us to make the determination by weighing the relevant state and tribal interests, and urges that the balance tilts in its favor. Oklahoma emphasizes that the fuel sold is used "almost exclusively on state roads," imposing "very substantial costs on the State—but no burden at all on the Tribe." Brief for Petitioner 9. The State also stresses that "the levy does not reach any value generated by the Tribe on Indian land," *id.*, at 10; *i. e.*, the fuel is not produced or refined in Indian country, and is often sold to outsiders.

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[6] The Court of Appeals noted:

"In *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151, n. 16 . . . (1980), the Supreme Court declined to reach the question whether Indian reservations might be encompassed by the Hayden-Cartwright Act, 4 U. S. C. § 104, which provides for the imposition of state fuel taxes 'on United States military or other reservations.' This issue was not raised before this court, and we express no opinion on it." 31 F. 3d 964, 972, n. 4 (1994).

[7] This Court's Rule 14.1(a); see *Yee* v. *Escondido*, 503 U. S. 519, 533 (1992). Cf. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379–380 (1995) (reaching issue addressed in decision under review and "fairly embraced within" both the question set forth in the petition for certiorari and the argument advanced in the petition).

We have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation, see, *e. g.*, *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 216–217 (1987) (balancing interests affected by State's attempt to regulate on-reservation high-stakes bingo operation), and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians, see, *e. g.*, *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 483 (1976) (balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians; precedent about state taxation of Indians is not controlling because "this [collection] burden is not, strictly speaking, a tax at all").

But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 258 (1992) (citation omitted). Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373 (1976) (tax on Indian-owned personal property situated in Indian country); *McClanahan*, 411 U. S., at 165–166 (tax on income earned on reservation by tribal members residing on reservation).

The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax.

If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. See, *e. g., Moe,* 425 U. S., at 475–481 (Montana's cigarette sales tax imposed on retail consumers could not be applied to on-reservation "smoke shop" sales to tribal members). But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, see *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134, 154–157 (1980), and may place on a tribe or tribal members "minimal burdens" in collecting the toll, *Department of Taxation and Finance of N. Y.* v. *Milhelm Attea & Bros.,* 512 U. S. 61, 73 (1994). Thus, the inquiry proper here is whether the legal incidence of Oklahoma's fuels tax rests on the Tribe (as retailer), or on some other transactors—here, the wholesalers who sell to the Tribe or the consumers who buy from the Tribe.[8]

Judicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members. See *Yakima,* 502 U. S., at 267. The State complains, however, that the legal incidence of a tax "'has no relationship to economic realities.'" Brief for Petitioner 30 (quoting *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 279 (1977)). But our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make "economic reality" our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product. Cf. *Yakima,* 502 U. S., at 267–268 (categorical approach safeguards against risk of litigation that could "engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel").

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[8] In weighing the affected interests without determining the legal incidence of the fuels tax, the District Court apparently confused our cases about state taxation of non-Indians with those about state taxation of Indians. The court cited a case of the former type, *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134 (1980). See App. to Pet. for Cert. 36a. But in *Colville* we resorted to balancing only after determining that the legal incidence of the challenged levy was on non-Indian consumers. 447 U. S., at 142, n. 9.

By contrast, a "legal incidence" test, as 11 States with large Indian populations have informed us, "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." Brief for South Dakota et al. as *Amici Curiae* 2.[9] And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence. So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks "by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." Pet. for Cert. 17; see Brief for Respondent 10–13.[10]

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[9] Support for focusing on legal incidence is also indicated in cases arising in the analogous context of the Federal Government's immunity from state taxation. See *United States* v. *County of Fresno,* 429 U. S. 452, 459 (1977) ("States may not . . . impose taxes the legal incidence of which falls on the Federal Government.").

[10] A measure designed to do just that, Committee Substitute for H. B. 1522, 45th Okla. Leg., 1st Sess. (1995), was approved by the Oklahoma House of Representatives on March 9, 1995, but failed to gain passage in the Oklahoma Senate during the legislature's 1995 session. See Brief for Respondent 11, 1a–23a; Supplemental Brief for Respondent 1.

C

The State also argues that, even if legal incidence is key, the Tenth Circuit erred in holding that the fuels tax's legal incidence rests on the retailer (here, the Tribe). We consider the Court of Appeals' ruling on this point altogether reasonable, and therefore uphold it. See, *e. g., Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983) (noting "our practice to accept a reasonable construction of state law by the court of appeals").

The Oklahoma legislation does not expressly identify who bears the tax's legal incidence—distributors, retailers, or consumers; nor does it contain a "pass through" provision, requiring distributors and retailers to pass on the tax's cost to consumers. Cf. *Moe*, 425 U. S., at 482 (statute at issue provided that Montana cigarette tax " 'shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only' ").

In the absence of such dispositive language, the question is one of "fair interpretation of the taxing statute as written and applied." *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U. S. 9, 11 (1985) *(per curiam).* Oklahoma's law requires fuel distributors to "remit" the amount of tax due to the Tax Commission; crucially, the statute describes this remittal by the distributor as "*on behalf of a licensed retailer.*" Okla. Stat., Tit. 68, § 505(C) (1991) (emphasis added). The inference that the tax obligation is legally the retailer's, not the distributor's, is supported by the prescriptions that sales between distributors are exempt from taxation, § 507, but sales from a distributor to a retailer are subject to taxation, § 505(E). Further, if the distributor remits taxes it subsequently is unable to collect from the retailer, the distributor may deduct the uncollected amount from its future payments to the Tax Commission. § 505(C). The distributor, then, "is no more than a transmittal agent for the taxes imposed on the retailer." 31 F. 3d, at 971. And for their services as "agent of the state for [tax] collection," distributors retain a small portion of the taxes they collect. § 506(a).

The fuels tax law contains no comparable indication that retailers are simply collection agents for taxes ultimately imposed on consumers. No provision sets off the retailer's liability when consumers fail to make payments due; neither are retailers compensated for their tax collection efforts. And the tax imposed when a distributor sells fuel to a retailer applies whether or not the fuel is ever purchased by a consumer. See, *e. g.*, § 502 ("There is hereby levied an excise tax . . . upon the sale of each and every gallon of gasoline sold, or stored and distributed, or withdrawn from storage . . . ."). Finally, Oklahoma's law imposes no liability of any kind on a consumer for purchasing, possessing, or using untaxed fuel; in contrast, the legislation makes it unlawful for distributors or retailers "to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state." § 505(C).

As the Court of Appeals fairly and reasonably concluded: "[T]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel"; the "motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer." 31 F. 3d, at 971–972.

III

Regarding Oklahoma's income tax, the Court of Appeals declared that the State may not tax the wages of members of the Chickasaw Nation who work for the Tribe, including members who reside in Oklahoma outside Indian country.

The holding on tribal members who live in the State outside Indian country runs up against a well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction:[11]

> "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government . . . . These are rights and privileges which attach to domicil within the state. . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived." *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 312–313 (1937).

This "general principl[e] . . . ha[s] international acceptance." American Law Institute, Federal Income Tax Project: International Aspects of United States Income Taxation 4, 6 (1987); see, *e. g.,* C. Cretton, Expatriate Tax Manual 1 (2d ed. 1991) ("An individual who is resident in the UK is subject to income tax on all his sources of income, worldwide."). It has been applied both to the States, *e. g., Shaffer* v. *Carter,* 252 U. S. 37, 57 (1920); see 2 J. Hellerstein & W. Hellerstein, State Taxation § 20.04, p. 20–13 (1992), and to the Federal Government, *e. g., Cook* v. *Tait,* 265 U. S. 47, 56 (1924); see 1 J. Isenbergh, International Taxation 45–56 (1990).[12]

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[11] For nonresidents, in contrast, jurisdictions generally may tax only income earned within the jurisdiction. See *Shaffer* v. *Carter,* 252 U. S. 37, 57 (1920) (as to residents, a State "may, and does, exert its taxing power over their income from all sources"; as to nonresidents, "the tax is only on such income as is derived from . . . sources [within the State]").

[12] Although sovereigns have authority to tax all income of their residents, including income earned outside their borders, they sometimes elect not to do so, and they commonly credit income taxes paid to other sovereigns. But "[i]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations." American Law Institute, Federal Income

The Tribe seeks to block the State from exercising its ordinary prerogative to tax the income of every resident; in particular, the Tribe seeks to shelter from state taxation the income of tribal members who live in Oklahoma outside Indian country but work for the Tribe on tribal lands.[13] For the exception the Tribe would carve out of the State's taxing authority, the Tribe gains no support from the rule that Indians and Indian tribes are generally immune from state taxation, *McClanahan* v. *Arizona Tax Comm'n,* 411 U. S. 164 (1973), as this principle does not operate outside Indian country. *Oklahoma Tax Comm'n* v. *Sac and Fox Nation,* 508 U. S. 114, 123–126 (1993).

Notably, the Tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance. See Brief in Opposition 9–10 ("infringement" question is not presented to this Court); Brief for Respondent 42, n. 37; see also *Sac and Fox,* 508 U. S., at 126 (reserving question "whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income

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Tax Project: International Aspects of United States Income Taxation 6 (1987).

Concerning salaries of United States resident "diplomats and employees of international organizations," *post,* at 470, the dissent speaks of "treaties" as the wellsprings of "an *exception*" to otherwise governing tax law. That is not quite right. It is dominantly United States internal law that sets the ground rules for exemptions accorded employees of foreign governments and international organizations. In return for exemption of foreign government employees from United States federal taxation, § 893 of the Internal Revenue Code requires that the employer government grant equivalent exemption to United States Government employees performing similar services abroad. 26 U. S. C. § 893(a)(3); see *Toll* v. *Moreno,* 458 U. S. 1, 15–16 (1982) (identifying statutory genesis of § 893 exemption); 1 J. Isenbergh, International Taxation 393–394 (1990).

[13] The Tribe's claim, as presented in this case, is a narrow one. The Tribe does not assert here its authority to tax the income of these tribal members. Nor does it complain that Oklahoma fails to award a credit against state taxes for taxes paid to the Tribe.

earned from work performed for the Tribe itself when the employee does not reside in Indian country").[14]

Instead, the Tribe relies on the argument that Oklahoma's levy impairs rights granted or reserved by federal law. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 148–149 ("[E]xpress federal law to the contrary" overrides the general rule that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). The Tribe invokes the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333–334, which provides in pertinent part:

> "The Government and people of the United States are hereby obliged to secure to the said [Chickasaw[15]] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U. S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws . . . ."

According to the Tribe, the State's income tax, when imposed on tribal members employed by the Tribe, is a law "for the government of the [Chickasaw] Nation of Red People and their descendants," and it is immaterial that these "descendants" live outside Indian country.

In evaluating this argument, we are mindful that "treaties should be construed liberally in favor of the Indians."

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[14] The United States suggests, as a potential disposition, that we remand on the "self-governance" question. Brief for United States as *Amicus Curiae* 30, n. 18. But an interference-with-self-governance plea was neither made in the lower courts nor presented here, and is therefore foreclosed in this case.

[15] This treaty, first concluded between the United States and the Choctaw Nation in 1830, became applicable to the Chickasaw Nation in 1837. See Treaty of Jan. 17, 1837, Art. I, 11 Stat. 573.

County of Oneida v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 247 (1985). But liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty. By its terms, the Treaty applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.

The Tribe and the United States[16] further urge us to read the Treaty in accord with the repudiated view that an income tax imposed on government employees should be treated as a tax on the government. See *Dobbins* v. *Commissioners of Erie Cty.*, 16 Pet. 435 (1842). But see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480 (1939) ("The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable . . . ."). Under this view, a tax on tribal members employed by the Tribe would be seen as an impermissible tax on the Tribe itself.

We doubt the signatories meant to incorporate this now-defunct view into the Treaty. They likely gave no thought to a State's authority to tax the income of tribal members living in the State's domain, because they did not expect any members to be there. On the contrary, the purpose of the Treaty was to put distance between the Tribe and the States. Under the Treaty, the Tribe moved across the Mississippi River, from its traditional lands within Mississippi and Alabama, to unsettled lands not then within a State. See D. Hale & A. Gibson, The Chickasaw 46–59 (1991).

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[16] In its alliance with the Tribe, the United States is not an entirely disinterested party. The United States affords Chickasaw tribal member employees no exemption from *federal* income tax. See *Squire* v. *Capoeman*, 351 U. S. 1, 6 (1956) ("[I]n ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other citizens."); *Hoptowit* v. *Commissioner*, 709 F. 2d 564 (CA9 1983) (rejecting claim of federal tax exemption for income from tribal employment); *Jourdain* v. *Commissioner*, 617 F. 2d 507 (CA8) *(per curiam)* (same), cert. denied, 449 U. S. 839 (1980). And, in computing employees' federal income tax base, state income tax is allowed as an itemized deduction. 26 U. S. C. § 164(a)(3). Thus, an exemption of wages from *state* income tax increases federal income tax revenue.

Moreover, importing the *Dobbins* rule into the Treaty would prove too much. That dubious doctrine, by typing taxation of wages earned by tribal employees as taxation of the Tribe itself, would require an exemption for *all* employees of the Tribe—not just tribal members, but nonmembers as well. The Court of Appeals rejected such an extension, see 31 F. 3d, at 975 ("It is settled that the income tax is imposed on the employee, not the employer . . . . Therefore, to the extent that the income tax is imposed on non-member employees who have no established claim to tribal ancestry, the tax does not infringe upon the treaty prohibition."), and even the Tribe is not urging this view before us, admitting that it is "substantially more tenuous." Brief for Respondent 47.

* * *

For the reasons stated, we affirm the judgment of the Court of Appeals as to the motor fuels tax, reverse that judgment as to the income tax, and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Treaty of Dancing Rabbit Creek,
Sept. 27, 1830, Article IV,
7 Stat. 333–334

The Government and people of the United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and

> property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. But the [Chickasaws], should this Treaty be ratified, express a wish that Congress may grant to the [Chickasaws] the right of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER join, concurring in part and dissenting in part.

I dissent from the portion of the Court's decision that permits Oklahoma to tax the wages that (1) the Tribe pays (2) to members of the Tribe (3) who work for the Tribe (4) within Indian country, but (5) who live outside Indian country, and, apparently, commute to work. The issue is whether such a tax falls within the scope of a promise this Nation made to the Chickasaw Nation in 1837—a promise that no "State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U. S. shall forever secure said [Chickasaw] Nation from, and against, all laws" except those the Tribe made itself (and certain others not relevant here). Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830) (see the Appendix to the opinion of the Court); Treaty of Jan. 17, 1837, 11 Stat. 573. In my view, this language covers the tax.

For one thing, history suggests that the signatories to the Treaty intended the language to provide a broad guarantee that state law would not apply to the Chickasaws *if* they moved west of the Mississippi River—which they did. The promise's broad reach was meant initially to induce the Choctaws to make such a move in 1830, and it was extended, in 1837, to the Chickasaws for the same reason, all with the hope that other tribes would follow. See A. DeRosier, Removal of the Choctaw Indians 46, 100–128 (1970); *id.*, at 104 (quoting, among other things, President Jackson's statement to Congress, in 1829, that "if the Indians remained east of the Mississippi River, they would be subject to the laws of the several states," but, if they accepted the Treaty and moved west, they would be "free of white men except for a few soldiers").

For another thing, the language of this promise, read broadly and in light of its purpose, fits the tax at issue. The United States promised to secure the "[Chickasaw] Nation from, and against, *all* laws" for the government of the Nation, except those the Nation made itself or that Congress made. Treaty of Dancing Rabbit Creek, *supra* (emphasis added). The law in question does not fall within one of the explicit exceptions to this promise. Nor need the Court read the Treaty as creating an additional implied exception where, as here, the law in question likely affects significantly and directly the way in which the Tribe conducts its affairs in areas subject to tribal jurisdiction—how much, for example, it will likely have to pay workers on its land and what kinds of tribal expenditures it consequently will be able to afford. The impact of the tax upon tribal wages, tribal members, and tribal land makes it possible, indeed reasonable, to consider Oklahoma's tax (insofar as it applies to these tribal wages) as amounting to a law "for the government of" the Tribe. Indeed, in 1837, when the United States made its promise to the Chickasaws, the law considered a tax like the present one to be a tax on its source—*i. e.*, the Tribe itself. See, *e. g., Dobbins* v. *Commissioners of Erie Cty.*, 16 Pet. 435, 445–448 (1842) (Federal Government employee salaries exempt from state tax laws). Although tax law subsequently changed, see *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 480 (1939), the empirical connection between tax and Tribe has not. The Treaty's basic objective, namely, practical protection for the Tribe, suggests that this unchanging empirical impact, rather than shifting legal tax theory, is the critical consideration.

The majority sets forth several strong arguments against the Treaty's application. But, ultimately, I do not find them convincing. It is true, as the majority points out, that well-established principles of tax law permit States to tax those who reside within their boundaries. It is equally true that the Chickasaws whom Oklahoma seeks to tax live in the State at large, although they work in Indian country. But, these truths simply pose the question in this case: Does the Treaty provide an *exception* to well-established principles of tax law, roughly the same way as do, say, treaties governing diplomats and employees of international organizations? See, *e. g., Toll* v. *Moreno*, 458 U. S. 1, 14–15 (1982) (explaining that some such individuals are exempt from federal, state, and local income taxation). The statement of basic tax principles, by themselves, cannot provide the answer.

The majority is also concerned about a "line-drawing" problem. If the Treaty invalidates the law before us, what about an Oklahoma tax, for example, on residents who work for, but are not members of, the Tribe? I acknowledge the problem of line drawing, but that problem exists irrespective of where the line is drawn here. And, because this tax (1) has a strong connection to tribal government (*i. e.*, it falls on tribal members, who work for the Tribe, in Indian country), (2) does not regulate conduct outside Indian country, and (3) does not (as the Solicitor General points out) represent an effort to recover a proportionate share of, say, the cost of providing state services to residents, I am convinced that it falls on the side of the line that the Treaty's language and purpose seek to prohibit. To decide that the Treaty prohibits the law here is not to decide whether or not it would prohibit a law with a weaker link to tribal government or a stronger impact outside Indian country.

One final legal consideration strengthens the conclusion I reach. The law requires courts to construe ambiguous treaties in favor of the Indians. *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 247 (1985). The majority believes that even a "liberal construction cannot save the Tribe's claim," *ante*, at 466, because the Treaty says that the United States is "obliged to secure to the said [Chickasaw] Nation . . . the jurisdiction and government of all the persons and property that may be *within their limits* west." Treaty of Dancing Rabbit Creek, 7 Stat. 333–334 (emphasis added). This language, when viewed in its historical context, however, seems primarily designed to point out that the Treaty operates only in respect to Chickasaw lands west of the Mississippi—*i. e.*, that the Chickasaws would receive no protection unless they moved there. Regardless, the Oklahoma tax in question does affect "persons," namely, tribal members, and "property," namely, their wages, which members work and which wages are paid well "within" the Nation's "limits," *i. e.*, in Indian country. Admittedly, the quoted language, by itself, does not say for certain that such effects are sufficient to bring the state law within the Treaty's prohibition, but neither does it clearly make residency (rather than, say, place of employment) an absolute prerequisite. In these circumstances, the law requires us to give the Tribe the benefit of the doubt.

Thus, in my view, whether we construe the Treaty's language liberally or literally, Oklahoma's tax falls within its scope. For these reasons, I believe the Treaty bars the tax. And, although I join the remainder of the Court's opinion, I respectfully dissent on this point.

SANDIN, UNIT TEAM MANAGER, HALAWA CORRECTIONAL FACILITY *v.* CONNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93–1911. Argued February 28, 1995—Decided June 19, 1995

In this suit, respondent Conner alleged that petitioner and other Hawaii prison officials deprived him of procedural due process when an adjustment committee refused to allow him to present witnesses during a disciplinary hearing and then sentenced him to segregation for misconduct. The District Court granted the officials summary judgment, but the Court of Appeals reversed, concluding that Conner had a liberty interest in remaining free of disciplinary segregation and that there was a disputed question of fact whether he had received all of the process due under *Wolff* v. *McDonnell,* 418 U. S. 539. The court based its conclusion on a prison regulation instructing the committee to find guilt when a misconduct charge is supported by substantial evidence, reasoning that the committee's duty to find guilt was nondiscretionary. From that regulation, it drew a negative inference that the committee may not impose segregation if it does not find substantial evidence of misconduct, that this is a state-created liberty interest, and that therefore *Wolff* entitled Conner to call witnesses.

Held: Neither the Hawaii prison regulation nor the Due Process Clause itself affords Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff.* Pp. 477–488.

(a) Under *Wolff,* States may in certain circumstances create liberty interests that are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. See also *Meachum* v. *Fano,* 427 U. S. 215. The methodology used in *Hewitt* v. *Helms,* 459 U. S. 460, and later cases has impermissibly shifted the focus of the liberty interest inquiry from one based on the nature of the deprivation to one based on language of a particular regulation. Under *Hewitt*'s methodology, prison regulations, such the one in this case, have been examined to see whether mandatory language and substantive predicates create an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's confinement conditions. This shift in focus has encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges. Courts have, in response, drawn negative inferences from that language. *Hewitt* creates disincentives for States to codify prison management procedures in the interest of uniform treatment in order to avoid the creation of "liberty" interests, and it has led to the involvement of federal courts in the day-to-day management of prisons. The time has come to return to those due process principles that were correctly established and applied in *Wolff* and *Meachum.* Pp. 477–484.

(b) Conner asserts, incorrectly, that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation. *Bell* v. *Wolfish,* 441 U. S. 520 (1979), and *Ingraham* v. *Wright,* 430 U. S. 651 (1977), distinguished. Pp. 484–485.

(c) Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest. At the time of his punishment, disciplinary segregation mirrored those conditions imposed upon inmates in administrative segregation and protective custody. Moreover, the State later expunged his disciplinary record, with respect to the more serious of the charges against him. And, his confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction. Conner's situation also does not present a case where the State's action will inevitably affect the duration of his sentence, since the chance that the misconduct finding will affect his parole status is simply too attenuated to invoke the Due Process Clause's procedural guarantees. Pp. 485–487.

15 F. 3d 1463, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 488. BREYER, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 491.

Steven S. Michaels, First Deputy Attorney General of Hawaii, argued the cause for petitioner. With him on the briefs were *Margery S. Bronster,* Attorney General of Hawaii, *Robert A. Marks,* former Attorney General, and *Kathleen M. Sato,* Deputy Attorney General.

Paul L. Hoffman argued the cause for respondents. With him on the brief was *Gary L. Bostwick*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause.

I

DeMont Conner was convicted of numerous state crimes, including murder, kidnaping, robbery, and burglary, for which he is currently serving an indeterminate sentence of

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*Briefs of *amici curiae* urging reversal were filed for the State of New Hampshire et al. by *Jeffrey R. Howard*, Attorney General of New Hampshire, *Douglas N. Jones*, Assistant Attorney General, and *Eleni M. Constantine*, and by the Attorneys General for their respective jurisdictions as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Donald E. Lungren* of California, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Bonnie J. Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Deborah T. Poritz* of New Jersey, *Frankie Sue Del Papa* of Nevada, *Tom Udall* of New Mexico, *G. Oliver Koppell* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Lee Fisher* of Ohio, *Susan B. Loving* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *Rosalie S. Ballentine* of the Virgin Islands, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *James E. Doyle* of Wisconsin, and *Joseph B. Meyer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Carl Varady*, *Margaret Winter*, *Elizabeth Alexander*, and *Alvin J. Bronstein*; and for the Edwin F. Mandel Legal Aid Clinic by *Gary H. Palm*.

30 years to life in a Hawaii prison. He was confined in the Halawa Correctional Facility, a maximum security prison in central Oahu. In August 1987, a prison officer escorted him from his cell to the module program area. The officer subjected Conner to a strip search, complete with an inspection of the rectal area. Conner retorted with angry and foul language directed at the officer. Eleven days later he received notice that he had been charged with disciplinary infractions. The notice charged Conner with "high misconduct" for using physical interference to impair a correctional function, and "low moderate misconduct" for using abusive or obscene language and for harassing employees.[1]

Conner appeared before an adjustment committee on August 28, 1987. The committee refused Conner's request to present witnesses at the hearing, stating that "[w]itnesses were unavailable due to move *[sic]* to the medium facility and being short staffed on the modules." App. to Pet. for Cert. A-67. At the conclusion of proceedings, the committee determined that Conner was guilty of the alleged misconduct. It sentenced him to 30 days' disciplinary segregation in the Special Holding Unit[2] for the physical obstruction charge, and four hours segregation for each of the other two charges to be served concurrent with the 30 days. *Id.*, at A–66 to A–67. Conner's segregation began August 31, 1987, and ended September 29, 1987.

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[1] Hawaii's prison regulations establish a hierarchy of misconduct ranging from "greatest misconduct," Haw. Admin. Rule § 17-201-6(a) (1983), to "minor misconduct," § 17-201-10. Section 17-201-7 enumerates offenses punishable as "high misconduct" and sets available punishment for such offenses at disciplinary segregation up to 30 days or any sanction other than disciplinary segregation. Section 17-201-9 lists offenses punishable as "low moderate misconduct" and sets punishment at disciplinary segregation up to four hours in cell, monetary restitution, or any sanction other than disciplinary segregation. In addition to the levels of misconduct which classify various misdeeds, the regulations also define "serious misconduct" as "that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours." § 17-201-12. Such misconduct is punished through adjustment committee procedures. *Ibid.* The parties apparently concede that the physical obstruction allegation constituted serious misconduct, but that the low moderate misconduct charges did not.

Conner sought administrative review within 14 days of receiving the committee's decision. Haw. Admin. Rule § 17–201–20(a) (1983). Nine months later, the deputy administrator found the high misconduct charge unsupported and expunged Conner's disciplinary record with respect to that charge. App. 249. But before the deputy administrator decided the appeal, Conner had brought this suit against the adjustment committee chair and other prison officials in the United States District Court for the District of Hawaii based on Rev. Stat. § 1979, 42 U. S. C. § 1983. His amended complaint prayed for injunctive relief, declaratory relief, and damages for, among other things, a deprivation of procedural due process in connection with the disciplinary hearing. The District Court granted summary judgment in favor of the prison officials.

The Court of Appeals for the Ninth Circuit reversed the judgment. *Conner* v. *Sakai*, 15 F. 3d 1463 (1993). It concluded that Conner had a liberty interest in remaining free from disciplinary segregation and that there was a disputed question of fact with respect to whether Conner received all of the process due under this Court's pronouncement in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). 15 F. 3d, at 1466. The Court of Appeals based its conclusion on a prison regulation that instructs the committee to find guilt when a charge of misconduct is supported by substantial evidence. Haw. Admin. Rule § 17-201-18(b)(2) (1983).[3] The Court of Appeals reasoned from *Kentucky Dept. of Corrections* v. *Thompson,* 490 U. S. 454 (1989), that the committee's duty to find guilt was nondiscretionary. From the language of the regulation, it drew a negative inference that the committee may not impose segregation if it does not find substantial evidence of misconduct. 15 F. 3d, at 1466. It viewed this as a state-created liberty interest, and therefore held that respondent was entitled to call witnesses by virtue of our opinion in *Wolff, supra.* We granted the State's petition for certiorari, 513 U. S. 921 (1994), and now reverse.

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[2] The Special Holding Unit (SHU) houses inmates placed in disciplinary segregation, § 17–201–19(c), administrative segregation, § 17–201–22, and protective custody, § 17–201–23. Single-person cells comprise the SHU and conditions are substantially similar for each of the three classifications of inmates housed there. Compare Exh. 60, 1 App. 142–155, with Exh. 61, 1 App. 156–168. With the exception of one extra phone call and one extra visiting privilege, inmates segregated for administrative reasons receive the same privilege revocations as those segregated for disciplinary reasons.

II

Our due process analysis begins with *Wolff.* There, Nebraska inmates challenged the decision of prison officials to revoke good time credits without adequate procedures. 418 U. S., at 553. Inmates earned good time credits under a state statute that bestowed mandatory sentence reductions for good behavior, *id.,* at 546, n. 6, revocable only for "'flagrant or serious misconduct,'" *id.,* at 545, n. 5 (citation omitted). We held that the Due Process Clause itself does not create a liberty interest in credit for good behavior, but that the statutory provision created a liberty interest in a "shortened prison sentence" which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct. *Id.*, at 557. The Court characterized this liberty interest as one of "real substance" *ibid.*, and articulated minimum procedures necessary to reach a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution," *id.*, at 556. Much of *Wolff*'s contribution to the landscape of prisoners' due process derived not from its description of liberty interests, but rather from its intricate balancing of prison management concerns with prisoners' liberty in determining the amount of process due. Its short discussion of the definition of a liberty interest, *Wolff, supra,* at 556–558, led to a more thorough treatment of the issue in *Meachum* v. *Fano,* 427 U. S. 215 (1976).

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[3] The full text of the regulation reads as follows:

"Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. *A finding of guilt shall be made where:*

"(1) The inmate or ward admits the violation or pleads guilty.

"(2) *The charge is supported by substantial evidence.*" Haw. Admin. Rule § 17-201-18(b)(2) (1983) (emphasis added).

Inmates in *Meachum* sought injunctive relief, declaratory relief, and damages by reason of transfers from a Massachusetts medium security prison to a maximum security facility with substantially less favorable conditions. The transfers were ordered in the aftermath of arson incidents for which the transferred inmates were thought to be responsible, and did not entail a loss of good time credits or any period of disciplinary confinement. *Id.*, at 222. The Court began with the proposition that the Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner. *Id.*, at 224. It then held that the Due Process Clause did not itself create a liberty interest in prisoners to be free from intrastate prison transfers. *Id.*, at 225. It reasoned that transfer to a maximum security facility, albeit one with more burdensome conditions, was "within the normal limits or range of custody which the conviction has authorized the State to impose." *Ibid.;* see also *Montanye* v. *Haymes,* 427 U. S. 236, 242 (1976). The Court distinguished *Wolff* by noting that there the protected liberty interest in good time credit had been created by state law; here no comparable Massachusetts law stripped officials of the discretion to transfer prisoners to alternative facilities "for whatever reason or for no reason at all." *Meachum, supra,* at 228.[4]

Shortly after *Meachum,* the Court embarked on a different approach to defining state-created liberty interests. Because dictum in *Meachum* distinguished *Wolff* by focusing on whether state action was mandatory or discretionary, the Court in later cases laid ever greater emphasis on this somewhat mechanical dichotomy. *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex,* 442 U. S. 1 (1979), foreshadowed the methodology that would come to full fruition in *Hewitt* v. *Helms,* 459 U. S. 460 (1983). The *Greenholtz* inmates alleged that they had been unconstitutionally denied parole. Their claim centered on a state statute that set the date for discretionary parole at the time the minimum term of imprisonment less good time credits expired. The statute ordered release of a prisoner at that time, unless one of four specific conditions were shown. 442 U. S., at 11. The Court apparently accepted the inmates' argument that the word "shall" in the statute created a legitimate expectation of release absent the requisite finding that one of the justifications for deferral existed, since the Court concluded that some measure of constitutional protection was due. Nevertheless, the State ultimately prevailed because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment.

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[4] Later cases, such as *Vitek* v. *Jones,* 445 U. S. 480 (1980), found that the Due Process Clause itself confers a liberty interest in certain situations. In *Vitek,* a prisoner was to be transferred involuntarily to a state mental hospital for treatment of a mental disease or defect; the Court held that his right to be free from such transfer was a liberty interest irrespective of state regulation; it was "qualitatively different" from the punishment characteristically suffered by a person convicted of crime, and had "stigmatizing consequences." *Id.,* at 493–494. *Washington* v. *Harper,* 494 U. S. 210, 221–222 (1990), likewise concluded that, independent of any state regulation, an inmate had a liberty interest in being protected from the involuntary administration of psychotropic drugs.

The Court made explicit in *Hewitt* what was implicit in *Greenholtz.* In evaluating the claims of inmates who had been confined to administrative segregation, it first rejected the inmates' claim of a right to remain in the general population as protected by the Due Process Clause on the authority of *Meachum, Montanye,* and *Vitek.* The Due Process Clause standing alone confers no liberty interest in freedom from state action taken "'within the sentence imposed.'" 459 U. S., at 468. It then concluded that the transfer to less amenable quarters for nonpunitive reasons was "ordinarily contemplated by a prison sentence." *Ibid.* Examination of the possibility that the State had created a liberty interest by virtue of its prison regulations followed. Instead of looking to whether the State created an interest of "real substance" comparable to the good time credit scheme of *Wolff,* the Court asked whether the State had gone beyond issuing mere procedural guidelines and had used "language of an unmistakably mandatory character" such that the incursion on liberty would not occur "absent specified substantive predicates." *Id.,* at 471–472. Finding such mandatory directives in the regulations before it, the Court decided that the State had created a protected liberty interest. It nevertheless, held, as it had in *Greenholtz,* that the full panoply of procedures conferred in *Wolff* were unnecessary to safeguard the inmates' interest and, if imposed, would undermine the prison's management objectives.

As this methodology took hold, no longer did inmates need to rely on a showing that they had suffered a "'grievous loss'" of liberty retained even after sentenced to terms of imprisonment. *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972) (citation omitted). For the Court had ceased to examine the "nature" of the interest with respect to interests allegedly created by the State. See *ibid.; Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 571 (1972). In a series of cases since *Hewitt,* the Court has wrestled with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement.

In *Olim* v. *Wakinekona,* 461 U. S. 238 (1983), the claimants identified prison regulations that required a particular kind of hearing before the prison administrator could, in his discretion, effect an interstate transfer to another prison. Parsing the language of the regulation led the Court to hold that the discretionary nature of the transfer decision negated any state-created liberty interest. *Id.,* at 249–250. *Kentucky Dept. of Corrections* v. *Thompson,* 490 U. S. 454 (1989), dealt with regulations governing the visitation privileges of inmates. Asserting that a regulation created an absolute right to visitors absent a finding of certain substantive predicates, the inmates sought review of the adequacy of the procedures. As in *Wakinekona,* the Court determined the regulation left visitor exclusion to the discretion of the officials, and refused to elevate such expectations to the level of a liberty interest. 490 U. S., at 464–465.

By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations. The Court of Appeals' approach in this case is typical: It inferred from the mandatory directive that a finding of guilt "shall" be imposed under certain conditions the conclusion that the absence of such conditions prevents a finding of guilt.

Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison. Not only are such regulations not designed to confer rights on inmates, but the result of the negative implication jurisprudence is not to require the prison officials to follow the negative implication drawn from the regulation, but is instead to attach procedural protections that may be of quite a different nature. Here, for example, the Court of Appeals did not hold that a finding of guilt could *not* be made in the *absence* of substantial evidence. Instead, it held that the "liberty interest" created by the regulation entitled the inmate to the procedural protections set forth in *Wolff.*

Hewitt has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment. Prison administrators need be concerned with the safety of the staff and inmate population. Ensuring that welfare often leads prison administrators to curb the discretion of staff on the front line who daily encounter prisoners hostile to the authoritarian structure of the prison environment. Such guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents. The approach embraced by *Hewitt* discourages this desirable development: States may avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel.

Second, the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment. *Wolff,* 418 U. S., at 561–563; *Hewitt,* 459 U. S., at 470–471; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U. S. 119, 125 (1977). Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims since *Hewitt.* See, *e. g., Klos* v. *Haskell,* 48 F. 3d 81, 82 (CA2 1995) (claiming liberty interest in right to participate in "shock program"—a type of boot camp for inmates); *Segal* v. *Biller,* No. 94–35448, 1994 U. S. App. LEXIS 30628 (CA9, Oct. 31, 1994) (unpublished) (claiming liberty interest in a waiver of the travel limit imposed on prison furloughs); *Burgin* v. *Nix,* 899 F. 2d 733, 735 (CA8 1990) (claiming liberty interest in receiving a tray lunch rather than a sack lunch); *Spruytte* v. *Walters,* 753 F. 2d 498, 506–508 (CA6 1985) (finding liberty interest in receiving a paperback dictionary due to a rule that states a prisoner " 'may receive any book . . . which does not present a threat to the order or security of the institution' ") (citation omitted); *Lyon* v. *Farrier,* 727 F. 2d 766, 768–769 (CA8 1984) (claiming liberty interest in freedom from transfer to a smaller cell without electrical outlets for televisions and liberty interest in a prison job); *United States* v. *Michigan,* 680 F. Supp. 270, 277 (WD Mich. 1988) (finding liberty interest in not being placed on food loaf diet).

In light of the above discussion, we believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum.*[5] Following *Wolff,* we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. See also *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, *e. g., Vitek*, 445 U. S., at 493 (transfer to mental hospital), and *Washington*, 494 U. S., at 221–222 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

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[5] Such abandonment of *Hewitt's* methodology does not technically require us to overrule any holding of this Court. The Court in *Olim* v. *Wakinekona,* 461 U. S. 238 (1983), and *Kentucky Dept. of Corrections* v. *Thompson,* 490 U. S. 454 (1989), concluded no liberty interest was at stake. Although it did locate a liberty interest in *Hewitt,* it concluded that due process required no additional procedural guarantees for the inmate. As such, its answer to the anterior question of whether the inmate possessed a liberty interest at all was unnecessary to the disposition of the case. Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results.

Conner asserts, incorrectly, that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation. Neither *Bell* v. *Wolfish*, 441 U. S. 520 (1979), nor *Ingraham* v. *Wright*, 430 U. S. 651 (1977), requires such a rule. *Bell* dealt with the interests of pretrial detainees and not convicted prisoners. See also *United States* v. *Salerno*, 481 U. S. 739, 747 (1987) (distinguishing between "impermissible punishment" and "permissible regulation" of pretrial detainees). The Court in *Bell* correctly noted that a detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U. S., at 535. The Court expressed concern that a State would attempt to punish a detainee for the crime for which he was indicted via preconviction holding conditions. *Id.*, at 539. Such a course would improperly extend the legitimate reasons for which such persons are detained—to ensure their presence at trial.[6]

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[6] Similar concerns drove the conclusion in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), holding that free citizens must receive procedural protections prior to revocation of citizenship for draft evasion. Without discussing "liberty interests," the Court recognized that deprivation of the "most precious right" of citizenship necessitated process by way of jury trial under the Fifth and Sixth Amendments. *Id.*, at 159. As in *Bell*, the Court feared the Government would enforce the criminal

The same distinction applies to *Ingraham*, which addressed the rights of schoolchildren to remain free from arbitrary corporal punishment. The Court noted that the Due Process Clause historically encompassed the notion that the State could not "physically punish an individual except in accordance with due process of law" and so found schoolchildren sheltered. 430 U. S., at 674. Although children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State.

The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham*. The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitative goals. See *State* v. *Alvey*, 67 Haw. 49, 55, 678 P. 2d 5, 9 (1984). Admittedly, prisoners do not shed all constitutional rights at the prison gate, *Wolff*, 418 U. S., at 555, but "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Jones*, 433 U. S., at 125, quoting *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law.

This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence. Although Conner points to dicta in cases implying that solitary confinement automatically triggers due process protection, *Wolff, supra*, at 571, n. 19; *Baxter* v. *Palmigiano*, 425 U. S. 308, 323 (1976) (assuming with-

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law punishing draft evasion through the back door of denaturalization without prosecution for said crimes. 372 U. S., at 186.

out deciding that freedom from punitive segregation for "'serious misconduct'" implicates a liberty interest, holding only that the prisoner has no right to counsel) (citation omitted), this Court has not had the opportunity to address in an argued case the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests. We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest. The record shows that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.[7] We note also that the State expunged Conner's disciplinary record with respect to the "high misconduct" charge nine months after Conner served time in segregation. Thus, Conner's confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction. Indeed, the conditions at Halawa involve significant amounts of "lockdown time" even for inmates in the general population.[8] Based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment.[9]

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[7] Hawaii has repealed the regulations describing the structure of inmate privileges in the SHU when confined in administrative segregation, Brief for Petitioner 6, n. 3, but it retains inmate classification category "Maximum Custody I" in which inmate privileges are comparably limited. App. to Brief for Petitioner 48a–71a.

[8] General population inmates are confined to cells for anywhere between 12 and 16 hours a day, depending on their classification. 1 App. 126.

[9] The State notes, ironically, that Conner requested that he be placed in protective custody after he had been released from disciplinary segregation. *Id.*, at 43. Conner's own expectations have at times reflected a personal preference for the quietude of the SHU. Although we do not think a prisoner's subjective expectation is dispositive of the liberty inter-

Nor does Conner's situation present a case where the State's action will inevitably affect the duration of his sentence. Nothing in Hawaii's code requires the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, Haw. Rev. Stat. §§353–68, 353–69 (1985), even though misconduct is by regulation a relevant consideration, Haw. Admin. Rule §23–700–33(b) (effective Aug. 1992). The decision to release a prisoner rests on a myriad of considerations. And, the prisoner is afforded procedural protection at his parole hearing in order to explain the circumstances behind his misconduct record. Haw. Admin. Rule §§23–700–31(a), 23–700–35(c), 23–700–36 (1983). The chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause. The Court rejected a similar claim in *Meachum*, 427 U. S., at 229, n. 8 (declining to afford relief on the basis that petitioner's transfer record might affect his future confinement and possibility of parole).[10]

We hold, therefore, that neither the Hawaii prison regulation in question, nor the Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff.* The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.[11]

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est analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed.

[10] Again, we note that Hawaii expunged Conner's record with respect to the "high misconduct" charge, so he personally has no chance of receiving a delayed release from the parole board as a direct result of that allegation.

[11] Prisoners such as Conner, of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protec-

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Respondent DeMont Conner is a prisoner in a maximum-security Hawaii prison. After Conner reacted angrily to a strip search, a misconduct report charged him with obstructing the performance of a correctional officer's duties, using abusive language when talking to a staff member, and harassing a staff member. Conner received notice of the charges and had an opportunity, personally, to answer them. However, the disciplinary committee denied his request to call as witnesses staff members he said would attest to his innocence.

Conner contested the misconduct charges, but, according to the report of the disciplinary committee, he admitted his hesitation to follow orders and his use of profanity during the search. Based on Conner's statement to the committee, and on written statements submitted by the officer who conducted the search and his supervisor, the committee found Conner guilty of all charges. Sentenced to 30 days in the prison's segregation unit, Conner pursued an administrative appeal, which ultimately resulted in reversal of the obstruction conviction.

Unlike the Court, I conclude that Conner had a liberty interest, protected by the Fourteenth Amendment's Due Process Clause, in avoiding the disciplinary confinement he endured. As JUSTICE BREYER details, Conner's prison punishment effected a severe alteration in the conditions of his incarceration. See *post*, at 494. Disciplinary confine-

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tion Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

ment as punishment for "high misconduct" not only deprives prisoners of privileges for protracted periods; unlike administrative segregation and protective custody, disciplinary confinement also stigmatizes them and diminishes parole prospects. Those immediate and lingering consequences should suffice to qualify such confinement as liberty depriving for purposes of Due Process Clause protection. See *Meachum* v. *Fano*, 427 U. S. 215, 234–235 (1976) (STEVENS, J., dissenting).[1]

I see the Due Process Clause itself, not Hawaii's prison code, as the wellspring of the protection due Conner. Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the "Liberty" enshrined among "unalienable Rights" with which all persons are "endowed by their Creator." Declaration of Independence; see *Meachum*, 427 U. S., at 230 (STEVENS, J., dissenting) ("[T]he Due Process Clause protects [the unalienable liberty recognized in the Declaration of Independence] rather than the particular rights or privileges conferred by specific laws or regulations.").[2]

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[1] The Court reasons that Conner's disciplinary confinement, "with insignificant exceptions, mirrored th[e] conditions imposed upon inmates in administrative segregation and protective custody," *ante*, at 486, and therefore implicated no constitutional liberty interest. But discipline means punishment for misconduct; it rests on a finding of wrongdoing that can adversely affect an inmate's parole prospects. Disciplinary confinement therefore cannot be bracketed with administrative segregation and protective custody, both measures that carry no long-term consequences. The Court notes, however, that the State eventually expunged Conner's disciplinary record, *ibid.*, as a result of his successful administrative appeal. But hindsight cannot tell us whether a liberty interest existed at the outset. One must, of course, know at the start the character of the interest at stake in order to determine *then* what process, if any, is constitutionally due. "All's well that ends well" cannot be the measure here.

Deriving the prisoner's due process right from the code for his prison, moreover, yields this practical anomaly: a State that scarcely attempts to control the behavior of its prison guards may, for that very laxity, escape constitutional accountability; a State that tightly cabins the discretion of its prison workers may, for that attentiveness, become vulnerable to constitutional claims. An incentive for ruleless prison management disserves the State's penological goals and jeopardizes the welfare of prisoners.

To fit the liberty recognized in our fundamental instrument of government, the process due by reason of the Constitution similarly should not depend on the particularities of the local prison's code. Rather, the basic, universal requirements are notice of the acts of misconduct prison officials say the inmate committed, and an opportunity to respond to the charges before a trustworthy decisionmaker. See generally Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1278–1281 (1975) (an unbiased tribunal, notice of the proposed government action and the grounds asserted for it, and an opportunity to present reasons why the proposed action should not be taken are fundamental; additional safeguards depend on the importance of the private interest, the utility of the particular safeguards, and the burden of affording them).

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[2] The Court describes a category of liberty interest that is something less than the one the Due Process Clause itself shields, something more than anything a prison code provides. The State may create a liberty interest, the Court tells us, when "atypical and significant hardship [would be borne by] the inmate in relation to the ordinary incidents of prison life." *Ante*, at 484; see *ante*, at 486. What design lies beneath these key words? The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an "atypical, significant deprivation," *ibid.*, and yet not trigger protection under the Due Process Clause directly.

For the reasons JUSTICE BREYER cogently presents, see *post*, at 504, a return of this case to the District Court would be unavoidable if it were recognized that Conner was deprived of liberty within the meaning of the Due Process Clause. But upon such a return, a renewed motion for summary judgment would be in order, for the record, as currently composed, does not show that Conner was denied any procedural protection warranted in his case.

In particular, a call for witnesses is properly refused when the projected testimony is not relevant to the matter in controversy. See *Wolff* v. *McDonnell*, 418 U. S. 539, 566 (1974) (justifications for a prison tribunal's refusing to hear witnesses are "irrelevance, lack of necessity, [and] the hazards [to institutional safety or correctional goals] presented in individual cases"). Unless Conner were to demonstrate, in face of the disciplinary committee's stated reliance on his own admissions, that an issue of material fact is genuinely in controversy, see Fed. Rules Civ. Proc. 56(c), (e), his due process claim would fail.

* * *

Because I conclude that Conner was deprived of liberty within the meaning of the Due Process Clause, I dissent from the judgment of the Court. I would return the case for a precisely focused determination whether Conner received the process that was indeed due.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

The specific question in this case is whether a particular punishment that, among other things, segregates an inmate from the general prison population for violating a disciplinary rule deprives the inmate of "liberty" within the terms of the Fourteenth Amendment's Due Process Clause. The majority, asking whether that punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *ante,* at 484, concludes that it does not do so. The majority's reasoning, however, particularly when read in light of this Court's precedents, seems to me to lead to the opposite conclusion. And, for that reason, I dissent.

I

The respondent, DeMont Conner, is an inmate at Halawa Correctional Facility, a maximum security prison in Hawaii. In August 1987, as a result of an altercation with a guard, prison authorities charged Conner with violating several prison disciplinary regulations, including one that prohibited "physical interference . . . resulting in the obstruction . . . of the performance of a correctional function. . . ." Haw. Admin. Rule § 17–201–7 (14) (1983). The prison's "adjustment committee" found Conner "guilty" and imposed a punishment of 30 days of "disciplinary segregation." Eventually, but after Conner had served the 30 days, a review official in the prison set aside the committee's determination, and expunged it from Conner's record.

In the meantime, Conner had brought this "civil rights" action in Federal District Court in Hawaii. See Rev. Stat. § 1979, 42 U. S. C. § 1983. He claimed, among other things, that the adjustment committee's failure to let him call certain witnesses had deprived him of his "liberty . . . without due process of law." U. S. Const., Amdt. 14, § 1. The District Court granted summary judgment for the prison officials. But, the Ninth Circuit agreed with Conner that the committee's punishment had deprived him of procedurally protected "liberty." 15 F. 3d 1463, 1466 (1993). It remanded the case to the District Court to determine whether the refusal to allow Conner to call the particular witnesses denied him of the process he was "due." See Part V, *infra.*

The issue before this Court is whether Conner's particular punishment amounted to a deprivation of Conner's "liberty" within the meaning of the Due Process Clause.

II

The Fourteenth Amendment says that a State shall not "deprive any person of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, § 1. In determining whether state officials have deprived an inmate, such as Conner, of a procedurally protected "liberty," this Court traditionally has looked either (1) to the nature of the deprivation (how severe, in degree or kind) or (2) to the State's rules governing the imposition of that deprivation (whether they, in effect, give the inmate a "right" to avoid it). See, *e. g., Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 460–461, 464–465 (1989). Thus, this Court has said that certain changes in conditions may be so severe or so different from ordinary conditions of confinement that, whether or not state law gives state authorities broad discretionary power to impose them, the state authorities may not do so "without complying with minimum requirements of due process." *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980) ("involuntary commitment to a mental hospital"); *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990) ("unwanted administration of antipsychotic drugs"). The Court has also said that deprivations that are less severe or more closely related to the original terms of confinement nonetheless will amount to deprivations of procedurally protected liberty, provided that state law (including prison regulations) narrowly cabins the legal power of authorities to impose the deprivation (thereby giving the inmate a kind of right to avoid it). See *Hewitt* v. *Helms*, 459 U. S. 460, 471–472 (1983) (liberty interest created by regulations "requiring . . . that administrative segregation will not occur absent specified substantive predicates"); *Thompson*, *supra*, at 461 ("method of inquiry . . . always has been to examine closely the language of the relevant statutes and regulations"); *Board of Pardons* v. *Allen*, 482 U. S. 369, 382 (1987) (O'CONNOR, J., dissenting) (insisting upon "standards that place real limits on decisionmaker discretion");

Olim v. *Wakinekona,* 461 U. S. 238, 248–249 (1983) (existence of liberty interest regarding interstate prison transfers depends upon state regulations); *Montanye* v. *Haymes,* 427 U. S. 236, 242 (1976) (same for intrastate prison transfers); *Meachum* v. *Fano,* 427 U. S. 215, 225–227 (1976) (same).

If we apply these general pre-existing principles to the relevant facts before us, it seems fairly clear, as the Ninth Circuit found, that the prison punishment here at issue deprived Conner of constitutionally protected "liberty." For one thing, the punishment worked a fairly major change in Conner's conditions. In the absence of the punishment, Conner, like other inmates in Halawa's general prison population would have left his cell and worked, taken classes, or mingled with others for eight *hours* each day. See Exh. 36, App. 126; Exh. 6, *id.,* at 101. As a result of disciplinary segregation, however, Conner, for 30 days, had to spend his entire time alone in his cell (with the exception of 50 *minutes* each day on average for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains). See Exh. 61, *id.,* at 156–157, 166. Cf. *Hughes* v. *Rowe,* 449 U. S. 5, 9, 11 (1980) *(per curiam)* (disciplinary "[s]egregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions"); *Wolff* v. *McDonnell,* 418 U. S. 539, 552, n. 9, 571–572, n. 19 (1974) ("solitary confinement"—*i. e.,* segregation "in the usual 'disciplinary cell'" or a "'dry cell'"—"represents a major change in the conditions of confinement"); *Baxter* v. *Palmigiano,* 425 U. S. 308, 323 (1976) (segregation for "'serious misconduct'" triggers due process protection) (citation omitted).

Moreover, irrespective of whether this punishment amounts to a deprivation of liberty *independent* of state law, here the prison's own disciplinary rules severely cabin the authority of prison officials to impose this kind of punishment. They provide (among other things):

> (a) that certain specified acts shall constitute *"high misconduct,"* Haw. Admin. Rule § 17–201–7a (1983) (emphasis added);
>
> (b) that misconduct punishable by more than four hours in disciplinary segregation "shall be punished" through a prison "adjustment committee" (composed of three unbiased members), §§ 17–201–12, 13;
>
> (c) that, when an inmate is charged with such misconduct, then (after notice and a hearing) "[a] finding of guilt shall be made" if the charged inmate admits guilt or the "charge is supported by substantial evidence," §§ 17–201–18(b), (b)(2); see §§ 17–201–16, 17; and
>
> (d) that the "[s]anctions" for high misconduct that "may be imposed as punishment . . . shall include . . . [d]isciplinary segregation up to thirty days," § 17–201–7(b).

The prison rules thus: (1) impose a punishment that is substantial, (2) restrict its imposition as a punishment to instances in which an inmate has committed a defined offense, and (3) prescribe nondiscretionary standards for determining whether or not an inmate committed that offense. Accordingly, under this Court's liberty-defining standards, imposing the punishment would "deprive" Conner of "liberty" within the meaning of the Due Process Clause. Compare *Hewitt* v. *Helms, supra,* at 471–472 (liberty interest created by regulations "requiring that . . . administrative segregation will not occur absent specified substantive predicates"), with *Thompson,* 490 U. S., at 457, n. 2 (no liberty interest created by regulations which gave officials broad discretion to refuse a visit whenever "there are reasonable grounds to believe that," among other things, "[t]he visit will be detrimental to the inmate's rehabilitation"). Thus, under existing law, the Ninth Circuit correctly decided that the punishment deprived Conner of procedurally protected liberty and that the District Court should go on to decide whether or not the prison's procedures provided Conner with the "process" that is "due."

III

The majority, while not disagreeing with this summary of pre-existing law, seeks to change, or to clarify, that law's "liberty" defining standards in one important respect. The majority believes that the Court's present "cabining of discretion" standard reads the Constitution as providing procedural protection for trivial "rights," as, for example, where prison rules set forth specific standards for the content of prison meals. *Ante,* at 482–483. It adds that this approach involves courts too deeply in routine matters of prison administration, all without sufficient justification. *Ante,* at 482. It therefore imposes a minimum standard, namely, that a deprivation falls within the Fourteenth Amendment's definition of "liberty" only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Ante,* at 484, 486.

I am not certain whether or not the Court means this standard to change prior law radically. If so, its generality threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain "atypical" hardships that pre-existing law would not have covered. There is no need, however, for a radical reading of this standard, nor any other significant change in present law, to achieve the majority's basic objective, namely, to read the Constitution's Due Process Clause to protect inmates against deprivations of freedom that are important, not comparatively insignificant. Rather, in my view, this concern simply requires elaborating, and explaining, the Court's present standards (without radical revision) in order to make clear that courts must apply them in light of the purposes they were meant to serve. As so read, the standards will not create procedurally protected "liberty" interests where only minor matters are at stake.

Three sets of considerations, taken together, support my conclusion that the Court need not (and today's generally phrased minimum standard therefore does not) significantly revise current doctrine by deciding to remove minor prison matters from federal-court scrutiny. First, although this Court has said, and continues to say, that *some* deprivations of an inmate's freedom are so severe in kind or degree (or so far removed from the original terms of confinement) that they amount to deprivations of liberty, irrespective of whether state law (or prison rules) "cabin discretion," *e. g., ante,* at 483–484; *Vitek* v. *Jones,* 445 U. S., at 491–494; *Washington* v. *Harper,* 494 U. S., at 221–222; cf. *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), it is not easy to specify just *when,* or *how much* of, a loss triggers this protection. There is a broad middle category of imposed restraints or deprivations that, considered by themselves, are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection.

Second, the difficult line-drawing task that this middle category implies helps to explain why this Court developed its additional liberty-defining standard, which looks to local law (examining whether that local law creates a "liberty" by significantly limiting the discretion of local authorities to impose a restraint). See, *e. g., Thompson, supra,* at 461; *Hewitt,* 459 U. S., at 471–472. Despite its similarity to the way in which the Court determines the existence, or nonexistence, of "property" for Due Process Clause purposes, the justification for looking at local law is not the same in the prisoner liberty context. In protecting property, the Due Process Clause often aims to protect *reliance,* say, reliance upon an "entitlement" that local (*i. e.,* nonconstitutional) law itself has created or helped to define. See *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"). In protecting liberty, however, the Due Process Clause protects, not this kind of reliance upon a government-conferred benefit, but rather an absence of government restraint, the very absence of restraint that we call freedom. Cf. *Meachum,* 427 U. S., at 230–231 (STEVENS, J., dissenting) (citing *Morrissey* v. *Brewer,* 408 U. S. 471, 482 (1972)).

Nevertheless, there are several *other* important reasons, in the prison context, to consider the provisions of state law. The fact that a further deprivation of an inmate's freedom takes place under local rules that cabin the authorities' discretionary power to impose the restraint suggests, *other things being equal,* that the matter is more likely to have played an important role in the life of the inmate. Cf. *Hewitt, supra,* at 488 (STEVENS, J., dissenting). It suggests, other things being equal, that the matter is more likely of a kind to which procedural protections historically have applied, and where they normally prove useful, for such rules often *single out* an inmate and condition a deprivation upon the existence, or nonexistence, of particular facts. Cf. *Thompson,* 490 U. S., at 468–470 (Marshall, J., dissenting); *United States* v. *Florida East Coast R. Co.,* 410 U. S. 224, 244–245 (1973). It suggests, other things being equal, that the matter will not involve highly judgmental administrative matters that call for the wise exercise of discretion—matters where courts reasonably should hesitate to second-guess prison administrators. See *Meachum, supra,* at 225. It suggests, other things being equal, that the inmate will have thought that he himself, through control of his own behavior, could have avoided the deprivation, and thereby have believed that (in the absence of his misbehavior) the restraint fell outside the "sentence imposed" upon him. Cf. *Thompson,* 490 U. S., at 464–465. Finally, courts can identify the presence or absence of cabined discretion fairly easily and objectively, at least much of the time. Cf. *id.*, at 461. These characteristics of "cabined discretion" mean that courts can use it as a kind of touchstone that can help them, when they consider the broad middle category of prisoner restraints, to separate those kinds of restraints that, in general, are more likely to call for constitutionally guaranteed procedural protection, from those that more likely do not. Given these reasons and the precedent, I believe courts will continue to find this touchstone helpful as they seek to apply the majority's middle category standard.

Third, there is, therefore, no need to apply the "discretion-cabining" approach—the basic purpose of which is to provide a somewhat more objective method for identifying deprivations of protected "liberty" within a broad middle range of prisoner restraints—where a deprivation is unimportant enough (or so similar in nature to ordinary imprisonment) that it rather clearly falls *outside* that middle category. Prison, by design, restricts the inmates' freedom. And, one cannot properly view unimportant matters that happen to be the subject of prison regulations as substantially aggravating a loss that has already occurred. Indeed, a regulation about a minor matter, for example, a regulation that seems to cabin the discretionary power of a prison administrator to deprive an inmate of, say, a certain kind of lunch, may amount simply to an instruction to the administrator about how to do his job, rather than a guarantee to the inmate of a "right" to the status quo. Cf. *Colon* v. *Schneider*, 899 F. 2d 660, 668 (CA7 1990) (rules governing use of Mace to subdue inmates "directed toward the prison staff, not the inmates"). Thus, this Court has never held that comparatively unimportant prisoner "deprivations" fall within the scope of the Due Process Clause even if local law limits the authority of prison administrators to impose such minor deprivations. See *Thompson*, *supra*, at 461, n. 3 (leaving question open). And, in my view, it should now simply specify that they do not.

I recognize that, as a consequence, courts must separate the unimportant from the potentially significant, without the help of the more objective "discretion-cabining" test. Yet, making that judicial judgment seems no more difficult than many other judicial tasks. See *Goss* v. *Lopez,* 419 U. S. 565, 576 (1975) ("*de minimis*" line defining property interests under the Due Process Clause). It seems to me possible to separate less significant matters such as television privileges, "sack" versus "tray" lunches, playing the state lottery, attending an ex-stepfather's funeral, or the limits of travel when on prison furlough, *e. g., Lyon* v. *Farrier,* 727 F. 2d 766, 768–769 (CA8 1984); *Burgin* v. *Nix,* 899 F. 2d 733, 734–735 (CA8 1990) *(per curiam); Hatch* v. *Sharp,* 919 F. 2d 1266, 1270 (CA7 1990); *Merritt* v. *Broglin,* 891 F. 2d 169, 173–174 (CA7 1989); *Segal* v. *Biller,* No. 94–35448, 1994 U. S. App. LEXIS 30628, *4–*5 (CA9, Oct. 31, 1994) (unpublished), from more significant matters, such as the solitary confinement at issue here. Indeed, prison regulations themselves may help in this respect, such as the regulations here which separate (from more serious matters) "low moderate" and "minor" misconduct. Compare, on the one hand, the maximum punishment for "moderate" misconduct of two weeks of disciplinary segregation, Haw. Admin. Rule § 17–201–8 (1983), with the less severe maximum punishments, on the other hand, for "low moderate" and "minor" misconduct, §§ 17–201–9, 10 (several hours of disciplinary segregation and "[l]oss of privileges" such as "community recreation; commissary; snacks; cigarettes, smoking; personal visits—no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days"; impounding personal property; extra duty; and reprimand).

The upshot is the following: the problems that the majority identifies suggest that this Court should make explicit the lower definitional limit, in the prison context, of "liberty" under the Due Process Clause—a limit that is already implicit in this Court's precedent. See *Morrissey* v. *Brewer,* 408 U. S., at 481 ("'grievous loss'") (citations omitted). Those problems do not require abandoning that precedent. *Kentucky Dept. of Corrections* v. *Thompson, supra; Olim* v. *Wakinekona,* 461 U. S. 238 (1983); *Hewitt* v. *Helms,* 459 U. S. 460 (1983); *Meachum* v. *Fano,* 427 U. S. 215 (1976); *Montanye* v. *Haymes,* 427 U. S. 236 (1976).

IV

The Court today reaffirms that the "liberty" protected by the Fourteenth Amendment includes interests that state law may create. *Ante,* at 483–484. It excludes relatively minor matters from that protection. *Ante,* at 484 (requiring "atypical and significant hardship on the inmate"). And, it does not question the vast body of case law, including cases from this Court and every Circuit, recognizing that segregation can deprive an inmate of constitutionally protected "liberty." See, *e. g., Hewitt, supra,* at 472; *Rodi* v. *Ventetuolo,* 941 F. 2d 22, 28 (CA1 1991); *Soto* v. *Walker,* 44 F. 3d 169, 172 (CA2 1995); *Layton* v. *Beyer,* 953 F. 2d 839, 849 (CA3 1992); *Baker* v. *Lyles,* 904 F. 2d 925, 929 (CA4 1990); *Dzana* v. *Foti,* 829 F. 2d 558, 560–561 (CA5 1987); *Mackey* v. *Dyke,* 29 F. 3d 1086, 1092 (CA6 1994); *Alston* v. *DeBruyn,* 13 F. 3d 1036, 1042–1043 (CA7 1994); *Brown* v. *Frey,* 889 F. 2d 159, 166 (CA8 1989); *Walker* v. *Sumner,* 14 F. 3d 1415, 1419 (CA9 1994); *Reynoldson* v. *Shillinger,* 907 F. 2d 124, 126–127 (CA10 1990); *McQueen* v. *Tabah,* 839 F. 2d 1525, 1528–1529 (CA11 1988); *Lucas* v. *Hodges,* 730 F. 2d 1493, 1504–1506 (CADC 1984). That being so, it is difficult to see why the Court reverses, rather than affirms, the Court of Appeals in this case.

The majority finds that Conner's "discipline in segregated confinement did not present" an "atypical, significant deprivation" because of three special features of his case, taken together. *Ante,* at 486. First, the punishment "mirrored" conditions imposed upon inmates in "administrative segregation and protective custody." *Ibid.* Second, Hawaii's prison regulations give prison officials broad discretion to impose these other forms of *nonpunitive* segregation. *Ibid.* And, third, the State later "expunged Conner's disciplinary record," thereby erasing any stigma and transforming Conner's segregation for violation of a specific disciplinary rule into the sort of "totally discretionar[y] confinement" that would not have implicated a liberty interest. *Ibid.*

I agree with the first two of the majority's assertions. The conditions in administrative and disciplinary segregation *are* relatively similar in Hawaii. Compare Exh. 60, App. 142–143, 152, with Exh. 61, *id.*, at 156–157, 166. And, the rules governing administrative segregation do, indeed, provide prison officials with broad leeway. See Haw. Admin. Rule § 17–201–22(3) (1983) ("Whenever . . . justifiable reasons exist"). But, I disagree with the majority's assertion about the relevance of the expungement. How can a *later* decision of prison authorities transform Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules? How can a later expungement restore to Conner the liberty that, in fact, he had already lost? Because Conner was found guilty under prison disciplinary rules, and was sentenced to solitary confinement under those rules, the Court should look to *those* rules.

In sum, expungement or no, Conner suffered a deprivation that was significant, not insignificant. And, that deprivation took place under disciplinary rules that, as described in Part II, *supra*, do cabin official discretion sufficiently. I would therefore hold that Conner was deprived of "liberty" within the meaning of the Due Process Clause.

V

Other related legal principles, applicable here, should further alleviate the majority's fear that application of the Due Process Clause to significant prison disciplinary action, see

Part III, *supra*, will lead federal courts to intervene improperly (as the majority sees it) "in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Ante*, at 482. For one thing, the "process" that is "due" in the context of prison discipline is not the full blown procedure that accompanies criminal trials. Rather, "due process" itself is a flexible concept, which, in the context of a prison, must take account of the legitimate needs of prison administration when deciding what procedural elements basic considerations of fairness require. See, *e. g., Goss* v. *Lopez,* 419 U. S., at 578 (the " 'very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' ") (quoting *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U. S. 886, 895 (1961)); *Mathews* v. *Eldridge,* 424 U. S. 319, 334 (1976) (" '[D]ue process is flexible and calls for such procedural protections as the particular situation demands' ") (quoting *Morrissey* v. *Brewer, supra,* at 481); Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1278 (1975) ("required degree of procedural safeguards varies"); *Wolff,* 418 U. S., at 563–567 (requiring—in addition to notice, some kind of hearing, and written reasons for the decision—permission to call witnesses and to present documentary evidence when doing so "will not be unduly hazardous to institutional safety or correctional goals," *id.*, at 566).

More importantly for present purposes, whether or not a particular procedural element *normally* seems appropriate to a certain *kind* of proceeding, the Due Process Clause does not require process unless, in the *individual* case, there is a relevant factual dispute between the parties. Just as courts do not hold hearings when there is no "genuine" and "material" issue of fact in dispute between the parties, see Fed. Rule Civ. Proc. 56 (summary judgment), so the Due Process Clause does not entitle an inmate to additional disciplinary hearing procedure (such as the calling of a witness) unless there is a factual dispute (relevant to guilt) that the additional procedure might help to resolve, see *Codd* v. *Velger*, 429 U. S. 624, 627 (1977) *(per curiam).*

I mention this latter legal point both because it illustrates a legal protection against the meritless case, and because a review of the record before us indicates that, in this very case, if we were to affirm, it would pose an important obstacle to Conner's eventual success. The record contains the prison adjustment committee's report, which says that its finding of guilt rests upon Conner's own admissions. The committee wrote that it "based" its "decision" upon Conner's "statements" that (when he was strip-searched) "he turned around" and "looked at" the officer, he "then 'eyed up'" the officer, he "was hesitant to comply" with the strip-search instructions, he "dislikes" the officer, and he spoke an obscenity during the search process. App. to Pet. for Cert. A–67. The record contains no explanation that we have found, either in Conner's affidavits or elsewhere, of how the witnesses he wanted to call (or the other procedures that he sought) could have led to any evidence relevant to the facts at issue.

I note that the petitioner, in her petition for certiorari, asked us, for this reason, to decide this case in her favor. But, we cannot do so. Even were we to assume that this question falls within the scope of the question we agreed to answer, the record nonetheless reveals that the petitioner did not ask for summary judgment on this basis. Thus, Conner has not had an opportunity to point to "specific facts" that might explain why these witnesses (or other procedures) were needed. See Fed. Rule Civ. Proc. 56(e) ("must set forth specific facts showing that there is a genuine issue for trial"). Were this Court to affirm, the defense would remain free to move for summary judgment on remand, and Conner would have to respond with a specific factual showing in order to avoid an adverse judgment.

Because the Court of Appeals remanded this case to the District Court for consideration of these matters, and because, as explained in Parts II–IV, *supra,* I believe it correctly decided that Conner was deprived of liberty within the meaning of the Due Process Clause, I would affirm its judgment. For these reasons, I respectfully dissent.

UNITED STATES *v.* GAUDIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–514. Argued April 17, 1995—Decided June 19, 1995

Respondent was charged with violating 18 U. S. C. § 1001 by making false statements on Department of Housing and Urban Development (HUD) loan documents. After instructing the jury that the Government had to prove, *inter alia*, that the alleged false statements were material to HUD's activities and decisions, the District Court added that the issue of materiality is a matter for the court to decide rather than the jury and that the statements in question were material. The jury convicted respondent, but the Ninth Circuit reversed, holding that taking the question of materiality from the jury violated the Fifth and Sixth Amendments.

Held: The trial judge's refusal to submit the question of "materiality" to the jury was unconstitutional. Pp. 509–523.

(a) The Fifth and Sixth Amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. *Sullivan* v. *Louisiana*, 508 U. S. 275, 277–278. The Government concedes that "materiality" is an element of the offense that the Government must prove under § 1001. Pp. 509–511.

(b) The question whether the defendant's statement was material to the federal agency's decision is the sort of mixed question of law and fact that has typically been resolved by juries. See, *e. g., TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 450. The Government's position that the principle requiring the jury to decide all of a crime's elements applies to only the essential elements' factual components has no support in the case law. *Sparf* v. *United States*, 156 U. S. 51, 90, and the other authorities on which the Government relies, *e. g., Sullivan, supra*, at 275, all confirm that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. Pp. 511–515.

(c) There is no consistent historical tradition to support the Government's argument that, even if the jury generally must pass on all of a crime's elements, there is an exception for materiality determinations with respect to false statements in perjury prosecutions (which are analogous to the determinations made in § 1001 prosecutions). There was no clear practice of having the judge determine the materiality question in this country at or near the time the Bill of Rights was adopted. Indeed, state and federal cases appear not to have addressed the question until the latter part of the 19th century, at which time they did not display anything like the virtual unanimity claimed by the Government. Though uniform postratification practice can shed light upon the meaning of an ambiguous constitutional provision, the practice here is not uniform, and the core meaning of the constitutional guarantees is unambiguous. Pp. 515–519.

(d) The Government's contention that *stare decisis* requires respondent's constitutional claim to be denied is rejected. *Sinclair* v. *United States*, 279 U. S. 263, 298, is overruled. *Kungys* v. *United States*, 485 U. S. 759, 772, distinguished. Pp. 519–523.

28 F. 3d 943, affirmed.

Scalia, J., delivered the opinion for a unanimous Court. Rehnquist, C. J., filed a concurring opinion, in which O'Connor and Breyer, JJ., joined, *post*, p. 523.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Days, Assistant Attorney General Harris, Richard H. Seamon*, and *Kathleen A. Felton*.

Richard Hansen argued the cause for respondent. With him on the brief were *David Allen* and *Todd Maybrown*.*

Justice Scalia delivered the opinion of the Court.

In the trial at issue here, respondent was convicted of making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U. S. C. § 1001. The question presented is whether it was constitutional for the trial judge to refuse to submit the question of "materiality" to the jury.

I

In the 1980's, respondent engaged in a number of real estate transactions financed by loans insured by the Federal

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**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Bruce S. Rogow and *Beverly A. Pohl* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Housing Administration (FHA), an agency within the Department of Housing and Urban Development (HUD). Respondent would purchase rental housing, renovate it, obtain an inflated appraisal, and sell it to a "straw buyer" (a friend or relative), for whom respondent would arrange an FHA-insured mortgage loan. Then, as prearranged, respondent would repurchase the property (at a small profit to the straw buyer) and assume the mortgage loan. Twenty-nine of these ventures went into default.

Respondent was charged by federal indictment with, among other things, multiple counts of making false statements on federal loan documents in violation of 18 U. S. C. § 1001. Two of these counts charged that respondent had made false statements on HUD/FHA form 92800–5 by knowingly inflating the appraised value of the mortgaged property. The other false-statement counts charged that respondent had made misrepresentations on HUD/FHA form HUD–1, the settlement form used in closing the sales of the properties. Line 303 of this form requires disclosure of the closing costs to be paid or received by the borrower/buyer and the seller. The forms executed by respondent showed that the buyer was to pay some of the closing costs, whereas in fact he, the seller, had arranged to pay all of them. To prove the materiality of these false statements, the Government offered the testimony of several persons charged with administering FHA/HUD programs, who explained why the requested information was important.

At the close of the evidence, the United States District Court for the District of Montana instructed the jury that, to convict respondent, the Government was required to prove, *inter alia*, that the alleged false statements were material to the activities and decisions of HUD. But, the court further instructed, "[t]he issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements."

App. 24, 29. The jury convicted respondent of the § 1001 charges.

A panel of the Court of Appeals for the Ninth Circuit reversed these convictions because Circuit precedent dictated that materiality in a § 1001 prosecution be decided by the jury. 997 F. 2d 1267 (1993). On rehearing en banc, the Court of Appeals stood by this precedent. It held that taking the question of materiality from the jury denied respondent a right guaranteed by the Fifth and Sixth Amendments to the United States Constitution. 28 F. 3d 943 (1994). We granted certiorari. 513 U. S. 1071 (1995).

II

Section 1001 of Title 18 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

It is uncontested that conviction under this provision requires that the statements be "material" to the Government inquiry, and that "materiality" is an element of the offense that the Government must prove. The parties also agree on the definition of "materiality": The statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U. S. 759, 770 (1988) (internal quotation marks omitted). The question for our resolution is whether respondent was entitled to have this element of the crime determined by the jury.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.[1] *Sullivan* v. *Louisiana*, 508 U. S. 275, 277–278 (1993). The right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as requiring that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean . . . a trial by a jury of twelve men, impartially selected, who must unanimously *concur in the guilt of the accused before a legal conviction can be had.*" 2 J. Story, Commentaries on the Constitution of the United States 541, n. 2 (4th ed. 1873) (emphasis added and deleted).[2] This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.,* at 540–541. See also *Duncan* v. *Louisiana,* 391 U. S. 145, 151–154 (1968) (tracing the history of trial by jury).

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[1] The "beyond a reasonable doubt" point is not directly at issue in the present case, since it is unclear what standard of proof the District Court applied in making its determination of materiality, and since the Ninth Circuit's reversal of the District Court's judgment did not rest upon the standard used but upon the failure to submit the question to the jury. It is worth noting, however, that some courts which regard materiality as a "legal" question for the judge do not require the higher burden of proof. See, *e. g., United States* v. *Gribben*, 984 F. 2d 47, 51 (CA2 1993); *United States* v. *Chandler*, 752 F. 2d 1148, 1151 (CA6 1985).

[2] We held in *Williams* v. *Florida*, 399 U. S. 78 (1970), that the 12-person requirement to which Story referred is not an indispensable component of the right to trial by jury. But in so doing we emphasized that the jury's determination of ultimate guilt *is* indispensable. The "essential feature of a jury," we said, is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . [in] that group's determination of guilt or innocence." *Id.*, at 100. See also *Apo-*

III

Thus far, the resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality. To escape the force of this logic, the Government offers essentially three arguments. Having conceded the minor premise—that materiality is an element of the offense—the Government argues first, that the major premise is flawed; second, that (essentially) a page of history is worth a volume of logic, and uniform practice simply excludes the element of materiality from the syllogism; and third, that *stare decisis* requires the judgment here to be reversed.

A

As to the first, the Government's position is that "materiality," whether as a matter of logic or history, is a "legal" question, and that although we have sometimes spoken of "requiring the jury to decide 'all the elements of a criminal offense,' *e. g., Estelle* v. *McGuire,* [502 U. S. 62, 69] (1991); see *Victor* v. *Nebraska,* [511 U. S. 1, 5] (1994); *Patterson* v. *New York,* 432 U. S. 197, 210 (1977), the principle actually applies to *only the factual components* of the essential elements." Brief for United States 33 (emphasis added). The Government claims that this understanding of the jury's role

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daca v. *Oregon,* 406 U. S. 404 (1972) (plurality opinion) (applying similar analysis to conclude that jury unanimity is not constitutionally required).

dates back to *Sparf* v. *United States,* 156 U. S. 51 (1895), and is reaffirmed by recent decisions of this Court.

By limiting the jury's constitutionally prescribed role to "the factual components of the essential elements" the Government surely does not mean to concede that the jury must pass upon all elements that contain *some* factual component, for that test is amply met here. Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts. What the Government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. We see two difficulties with this. First, the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. See J. Thayer, Preliminary Treatise on Evidence at Common Law 194, 249–250 (1898). Indeed, our cases have recognized in other contexts that the materiality inquiry, involving as it does "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him, . . . [is] peculiarly on[e] for the trier of fact." *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U. S. 438, 450 (1976) (securities fraud); *McLanahan* v. *Universal Ins. Co.,* 1 Pet. 170, 188–189, 191 (1828) (materiality of false statements in insurance applications).

The second difficulty with the Government's position is that it has absolutely no historical support. If it were true, the lawbooks would be full of cases, regarding materiality and innumerable other "mixed-law-and-fact" issues, in which the criminal jury was required to come forth with "findings of fact" pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of "guilty" or "not guilty." We know of no such case. Juries at the time of the framing could not be forced to produce mere "factual findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L. J. 575, 591 (1922). See also G. Clementson, Special Verdicts and Special Findings by Juries 49 (1905); Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912–913 (1994). Justice Chase's defense to one of the charges in his 1805 impeachment trial was that "he well knows, that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries, to decide on the law as well as on the facts, in all criminal cases. This power he holds to be a sacred part of our legal privileges . . . ." 1 S. Smith & T. Lloyd, Trial of Samuel Chase 34 (1805).

Sparf, supra, the case on which the Government relies, had nothing to do with the issue before us here. The question there was whether the jury could be deprived of the power to determine, not only historical facts, not only mixed questions of fact and law, *but pure questions of law* in a criminal case. As the foregoing quotation from Justice Chase suggests, many thought the jury had such power. See generally Alschuler & Deiss, *supra,* at 902–916. We decided that it did not. In criminal cases, as in civil, we held, the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions. 156 U. S., at 105–106. But our decision in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts. To the contrary, Justice Harlan, writing for the Court, explained the many judicial assertions of the jury's right to determine both law and fact as expressions of "the principle, that when the question is *compounded of law and fact,* a general verdict, *ex necessitate,* disposes of the case in hand, both as to law and fact." *Id.,* at 90 (emphasis in original). He gave as an example the 1807 treason trial of Aaron Burr in which Chief Justice Marshall charged the jury that " 'levying war is an act *compounded of law and fact;* of which the jury, aided by the court must judge. . . . [And] hav[ing] now heard the opinion of the court on the *law* of the case[,] [t]hey *will apply that law to the facts,* and will find a verdict of guilty or not guilty as their own consciences may direct.' " *Id.,* at 67 (quoting 2 Burr's Trial 548, 550 (D. Robertson ed. 1875)) (emphasis in original). Other expressions of the same principle abound. See *United States* v. *Battiste,* 24 F. Cas. 1042, 1043 (No. 14,545) (CC Mass. 1835) (Story, J., sitting as Circuit Justice) (the jury's general verdict is "necessarily compounded of [both] law and fact"). As Thayer wrote at the end of the 19th century: "From the beginning . . . it was perceived that any general verdict, such as . . . not guilty, involved a conclusion of law, and that the jury did, in a sense, in such cases answer a question of law." Thayer, *supra,* at 253.

The more modern authorities the Government cites also do not support its concept of the criminal jury as mere factfinder. Although each contains language discussing the jury's role as factfinder, see *Sullivan* v. *Louisiana,* 508 U. S. 275 (1993); *Court of Ulster Cty.* v. *Allen,* 442 U. S. 140, 156 (1979); *Patterson* v. *New York,* 432 U. S. 197, 206 (1977); *In re Winship,* 397 U. S. 358, 364 (1970), each also confirms that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. The point is put with unmistakable clarity in *Allen,* which involved the constitutionality of statutory inferences and presumptions. Such devices, *Allen* said, can help

> "the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts . . . . Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt." *Allen, supra,* at 156.

See also *Sullivan, supra,* at 277 ("The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' "); *Patterson, supra,* at 204; *Winship, supra,* at 361, 363.

B

The Government next argues that, even if the jury is generally entitled to pass on all elements of a crime, there is a historical exception for materiality determinations in perjury prosecutions. We do not doubt that historical practice is relevant to what the Constitution means by such concepts as trial by jury, see *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 276–277 (1856); *Holland* v. *Illinois,* 493 U. S. 474, 481 (1990), and it is precisely historical practice that we have relied on in concluding that the jury must find all the elements. The existence of a unique historical exception to this principle—and an exception that reduces the power of the jury precisely when it is most important, *i. e.,* in a prosecution not for harming another individual, but for offending against the Government itself—would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so.

The practice of having courts determine the materiality of false statements in perjury prosecutions is neither as old, nor as uniform, as the Government suggests. In England, no pre-Revolution cases appear to have addressed the question, and the judges reached differing results when the issue finally arose in the mid-19th century. Compare *Queen* v. *Lavey,* 3 Car. & K. 26, 30, 175 Eng. Rep. 448, 450 (Q. B. 1850) (materiality is a jury question), *Queen* v. *Goddard,* 2 F. & F. 361, 175 Eng. Rep. 1096 (1861) (same), with *Queen* v. *Courtney,* 5 Ir. C. L. 434, 439 (Ct. Crim. App. 1856) (dictum) (materiality is a question for the judge); *Queen* v. *Gibbon,* Le. & Ca. 109, 113–114, 169 Eng. Rep. 1324, 1326 (1861) (same). It was not until 1911, 120 years after the adoption of our Bill of Rights, that the rule the Government argues for was finally adopted in England—not by judicial decision but by Act of Parliament. See Perjury Act of 1911, § 1(6), 1 & 2 Geo. V, ch. 6.

Much more importantly, there was also no clear practice of having the judge determine the materiality question in this country at or near the time the Bill of Rights was adopted. The Government cites *Power* v. *Price,* 16 Wend. 450 (N. Y. 1836), as "[t]he earliest reported case on the question" whether "materiality in perjury prosecutions is a question for the court rather than the jury," claiming that there "New York's highest court held that a trial judge had correctly reserved the question of materiality to itself." Brief for United States 18. *Power* held nothing even close to this. *Power* was not a perjury case; indeed, it was not even a criminal prosecution. It was a civil action in which Price sued Power for the slander of imputing to him the crime of perjury. The Court of Appeals held that Price did not need to prove the materiality of the alleged false statement in order to make out a prima facie case; but that Power could raise immateriality as an affirmative defense negating intent to impute perjury. 16 Wend., at 455–456. It then said that the trial court "was clearly right in instructing the jury that the testimony given on the former trial was proved to be material," since "it merely decided a question of law, arising upon the proof of facts as to which there was no dispute or contrariety of testimony." *Id.,* at 456. But the courts' power to resolve mixed-law-and-fact questions in civil cases is not at issue here; civil and criminal juries' required roles are obviously not identical, or else there could be no directed verdicts for civil plaintiffs. The other early case relied upon by the Government, *Steinman* v. *McWilliams*, 6 Pa. 170, 177–178 (1847), another slander case, is inapt for the same reason. The earliest American case involving the point that we have been able to find places the Government itself in opposition to its position here. In *United States* v. *Cowing*, 25 F. Cas. 680, 681 (No. 14,880) (CC DC 1835), the United States argued that materiality in a perjury prosecution was a matter for the jury's consideration, citing an unpublished decision of the General Court of Virginia. The federal court, however, did not address the issue.

State and federal cases appear not to have addressed the question until the latter part of the 19th century, at which time they do not display anything like the "virtual unanimity" claimed by the Government. Brief for United States 18. Some of the opinions cited by the Government, asserting that materiality was a question of "law" for the judge, appear to have involved either demurrers to the indictment or appeals from convictions in which the case for materiality was so weak that no reasonable juror could credit it—so that even on our view of the matter the case should not have gone to the jury. (The prosecution's failure to provide minimal evidence of materiality, like its failure to provide minimal evidence of any other element, of course raises a question of "law" that warrants dismissal.) See, *e. g.*, *United States* v. *Shinn*, 14 F. 447, 452 (CC Ore. 1882); *United States* v. *Singleton*, 54 F. 488, 489 (SD Ala. 1892); *United States* v. *Bedgood*, 49 F. 54, 60 (SD Ala. 1891); *Nelson* v. *State*, 32 Ark. Rep. 192, 195 (1877). And some of the other cited cases involve the convicted *defendant's* claim that materiality should not have been decided by the jury, so that even if the issue was not one of the prosecution's failure to make a threshold case, it did not arise in a context in which the defendant's right to

jury trial was at issue. See, *e. g., Cothran* v. *State,* 39 Miss. 541, 547 (1860); *State* v. *Williams,* 30 Mo. 364, 367 (1860); *State* v. *Lewis,* 10 Kan. 157, 160 (1872); *People* v. *Lem You,* 97 Cal. 224, 228–230, 32 P. 11, 12 (1893); *Thompson* v. *People,* 26 Colo. 496, 504, 59 P. 51, 54–55 (1899); *Barnes* v. *State,* 15 Ohio C. C. 14, 25–26 (1897).

Even assuming, however, that all the Government's last-half-of-the-19th-century cases fully stand for the proposition that the defendant has no right to jury determination of materiality, there are cases that support the other view. See *Commonwealth* v. *Grant,* 116 Mass. 17, 20 (1874); *Lawrence* v. *State,* 2 Tex. Crim. 479, 483–484 (1877); *State* v. *Spencer,* 45 La. Ann. 1, 11–12, 12 So. 135, 138 (1893); *Young* v. *People,* 134 Ill. 37, 42, 24 N. E. 1070, 1071 (1890) (approving the treatment of materiality as "a mixed question of law and fact, and thus one for the jury"). At most there had developed a division of authority on the point, as the treatise writers of the period amply demonstrate. Bishop in 1872 took the position that "[p]ractically, . . . the whole subject is to be passed upon by the jury, under instructions from the judge, as involving, like most other cases, mixed questions of law and of fact." 2 J. Bishop, Commentaries on Law of Criminal Procedure § 935, p. 508 (2d ed.). May's 1881 treatise reported that "[w]hether materiality is a question of law for the court or of fact for a jury, is a point upon which the authorities are about equally divided." J. May, Law of Crimes § 188, p. 205. Greenleaf, writing in 1883, sided with Bishop ("It seems that the materiality of the matter assigned is a question for the jury"), 3 S. Greenleaf, Law of Evidence § 195, p. 189, n. (b) (14th ed.)—but two editions later, in 1899, said that the question was one for the judge, 3 S. Greenleaf, Law of Evidence § 195, p. 196, n. 2 (16th ed.).

In sum, we find nothing like a consistent historical tradition supporting the proposition that the element of materiality in perjury prosecutions is to be decided by the judge. Since that proposition is contrary to the uniform general understanding (and we think the only understanding consistent with principle) that the Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime, we must reject those cases that have embraced it. Though uniform postratification practice can shed light upon the meaning of an ambiguous constitutional provision, the practice here is not uniform, and the core meaning of the constitutional guarantees is unambiguous.

C

The Government's final argument is that the principle of *stare decisis* requires that we deny respondent's constitutional claim, citing our decision in *Sinclair* v. *United States,* 279 U. S. 263 (1929). That case is not controlling in the strictest sense, since it involved the assertion of a Sixth Amendment right to have the jury determine, not "materiality" under § 1001, but rather "pertinency" under that provision of Title 2 making it criminal contempt of Congress to refuse to answer a "question pertinent to [a] question under [congressional] inquiry," Rev. Stat. § 102, 2 U. S. C. § 192. The two questions are similar, however, and the essential argument made by respondent here was made by appellant in that case, who sought reversal of his conviction because of the trial court's failure to submit the question of pertinency to the jury: "[I]t has been said over and over again, that every essential ingredient of the crime must be proven to the satisfaction of the jury beyond a reasonable doubt." Brief for Appellant in *Sinclair* v. *United States,* O. T. 1928, No. 555, p. 109; 279 U. S., at 277 (argument for appellant). Though we did not address the constitutional argument explicitly, we held that the question of pertinency was "rightly decided by the court as one of law." *Id.,* at 298. And tying the case even closer to the present one was our dictum that pertinency "is not essentially different from . . . materiality of false testimony," which "when an element in the crime of perjury, is one for the court." *Ibid.* Thus, while *Sinclair* is not strictly controlling, it is fair to say that we cannot hold for respondent today while still adhering to the reasoning and the holding of that case.

But the reasoning of *Sinclair* has already been repudiated in a number of respects. The opinion rested upon the assumption that "pertinency" is a pure question of law—that is, it does "not depend upon the probative value of evidence." *Ibid.* We contradicted that assumption in *Deutch* v. *United States*, 367 U. S. 456 (1961), reversing a conviction under § 192 because "the Government at the trial failed to carry its burden of proving the pertinence of the questions." *Id.*, at 469. Though it had introduced documentary and testimonial evidence "to show the subject of the subcommittee's inquiry," it had failed to provide evidence to support the conclusion that the petitioner's false statement was pertinent to that subject.

Our holding in *Sinclair* rested also upon the assertion that "[i]t would be incongruous and contrary to well-established principles to leave the determination of [the] matter [of pertinency] to a jury," 279 U. S., at 299, citing *ICC* v. *Brimson*, 154 U. S. 447, 489 (1894), and *Horning* v. *District of Columbia*, 254 U. S. 135 (1920). Both the cases cited to support that assertion have since been repudiated. *Brimson*'s holding that no right to jury trial attaches to criminal contempt proceedings was overruled in *Bloom* v. *Illinois*, 391 U. S. 194, 198–200 (1968). *Horning*'s holding that it was harmless error, if error at all, for a trial judge effectively to order the jury to convict, see 254 U. S., at 138, has been proved an unfortunate anomaly in light of subsequent cases. See *Quercia* v. *United States*, 289 U. S. 466, 468, 472 (1933); *Bihn* v. *United States*, 328 U. S. 633, 637–639 (1946).

Other reasoning in *Sinclair*, not yet repudiated, we repudiate now. It said that the question of pertinency "may be likened to those concerning relevancy at the trial of issues in court," which "is uniformly held [to be] a question of law" for the court. 279 U. S., at 298. But how relevancy is treated for purposes of determining the admissibility of evidence says nothing about how relevancy should be treated when (like "pertinence" or "materiality") it is made an element of a criminal offense. It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another. The question of probable cause to conduct a search, for example, is resolved by the judge when it arises in the context of a motion to suppress evidence obtained in the search; but by the jury when it is one of the elements of the crime of depriving a person of constitutional rights under color of law, see 18 U. S. C. §§241–242. Cf. *United States* v. *McQueeney*, 674 F. 2d 109, 114 (CA1 1982); *United States* v. *Barker*, 546 F. 2d 940, 947 (CADC 1976).

That leaves as the sole prop for *Sinclair* its reliance upon the unexamined proposition, never before endorsed by this Court, that materiality in perjury cases (which is analogous to pertinence in contempt cases) is a question of law for the judge. But just as there is nothing to support *Sinclair* except that proposition, there is, as we have seen, nothing to support that proposition except *Sinclair*. While this perfect circularity has a certain esthetic appeal, it has no logic. We do not minimize the role that *stare decisis* plays in our jurisprudence. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989). That role is somewhat reduced, however, in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior. See *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). It is reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution. See *ibid.* And we think *stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 480–481 (1989); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S. 320 (1972).

The Government also claims *stare decisis* benefit from our decision in *Kungys* v. *United States*, 485 U. S. 759 (1988), which held that, in appellate review of a District Court (nonjury) denaturalization proceeding, the appellate court's newly asserted standard of materiality could be applied to the facts by the appellate court itself, rather than requiring remand to the District Court for that application. *Id.*, at 772. But as we have observed, the characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes. It is hard to imagine questions more diverse than, on the one hand, whether an appellate court must remand to a district court for a determination of materiality in a denaturalization proceeding *(Kungys)* and, on the other hand, whether the Constitution requires the finding of the element of materiality in a criminal prosecution to be made by the jury (the present case). It can be argued that *Kungys* itself did not heed this advice, since it relied upon both our prior decision in *Sinclair*, see 485 U. S., at 772, and a decision of the United States Court of Appeals for the Sixth Circuit holding that materiality in a § 1001 prosecution is a question of "'law'" for the court, *ibid.* (quoting *United States* v. *Abadi*, 706 F. 2d 178, 180, cert. denied, 464 U. S. 821 (1983)). But the result in *Kungys* could be thought to follow *a fortiori* from the quite different cases of *Sinclair* and *Abadi*, whereas nonentitlement under the Sixth Amendment to a jury determination cannot possibly be thought to follow *a fortiori* from *Kungys*. In any event, *Kungys* assuredly did not involve an adjudication to which the Sixth Amendment right to jury trial attaches, see *Luria* v. *United States*, 231 U. S. 9 (1913), and hence had no reason to explore the constitutional ramifications of *Sinclair* and *Abadi*, as we do today. Whatever support it gave to the validity of those decisions was *obiter dicta*, and may properly be disregarded.

* * *

The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed that right. The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE BREYER join, concurring.

I join the Court's opinion. "A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970)." *Herrera* v. *Collins*, 506 U. S. 390, 398 (1993). As a result, "[t]he prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan* v. *Louisiana*, 508 U. S. 275, 277–278 (1993) (citations omitted); see also *Estelle* v. *McGuire*, 502 U. S. 62, 69 (1991) ("[T]he prosecution must prove all the elements of a criminal offense beyond a reasonable doubt"). The Government has conceded that 18 U. S. C. § 1001 requires that the false statements made by respondent be "material" to the Government inquiry, and that "materiality" is an element of the offense that the Government must prove in order to sustain a conviction. *Ante*, at 509; Brief for United States 11. The Government also has not challenged the Court of Appeals' determination that the error it identified was structural and plain. See *id.*, at 8, n. 5; see also 28 F. 3d 943, 951–952 (CA9 1994). In light of these concessions, I agree that "[t]he trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed" his "right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he [was] charged." *Ante*, at 522 and this page.

I write separately to point out that there are issues in this area of the law which, though similar to those decided in the Court's opinion, are not disposed of by the Court today. There is a certain syllogistic neatness about what we do decide: Every element of an offense charged must be proved to the satisfaction of the jury beyond a reasonable doubt; "materiality" is an element of the offense charged under § 1001; therefore, the jury, not the court, must decide the issue of materiality. But the Government's concessions have made this case a much easier one than it might otherwise have been.

Whether "materiality" is indeed an element of every offense under 18 U. S. C. § 1001 is not at all obvious from its text. Section 1001 of Title 18 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Currently, there is a conflict among the Courts of Appeals over whether materiality is an element of the offense created by the second clause of § 1001. Compare, *e. g., United States* v. *Corsino*, 812 F. 2d 26, 30 (CA1 1987) ("'While materiality is not an explicit requirement of the second, false statements, clause of § 1001, courts have inferred a judge-made limitation of materiality in order to exclude trifles from its coverage'"), with *United States* v. *Elkin*, 731 F. 2d 1005, 1009 (CA2 1984) ("It is settled in this Circuit that materiality is not an element of the offense of making a false statement in violation of § 1001"). The Court does not resolve that conflict; rather, it merely assumes that materiality is, in fact, an element of the false statement clause of § 1001. *Ante*, at 511; cf. *Sullivan*, *supra*, at 278, n. (assuming that reasonable-doubt jury instruction was erroneous in light of the "question presented and the State's failure to raise this issue below").

As with many aspects of statutory construction, determination of what elements constitute a crime often is subject to dispute. See, *e. g., National Organization for Women, Inc.* v. *Scheidler,* 510 U. S. 249, 262 (1994) (holding that "RICO contains no economic motive requirement"); *United States* v. *Culbert,* 435 U. S. 371, 380 (1978) (declining to limit the Hobbs Act's scope to an undefined category of conduct termed "racketeering"). "[I]n determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania,* 477 U. S. 79, 85 (1986). Nothing in the Court's decision stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration. We have noted that " '[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.' " *Staples* v. *United States,* 511 U. S. 600, 604 (1994) (quoting *Liparota* v. *United States,* 471 U. S. 419, 424 (1985)); see also *McMillan, supra,* at 85. Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. See *Patterson* v. *New York,* 432 U. S. 197, 210 (1977). Federal and state legislatures may reallocate burdens of proof by labeling elements as affirmative defenses, *ibid.,* or they may convert elements into "sentencing factor[s]" for consideration by the sentencing court, *McMillan, supra,* at 85–86. The Court today does not resolve what role materiality plays under § 1001.

The Court properly acknowledges that other mixed questions of law and fact remain the proper domain of the trial court. *Ante,* at 520–521. Preliminary questions in a trial regarding the admissibility of evidence, Fed. Rule Evid. 104(a), the competency of witnesses, *ibid.,* the voluntariness of confessions, *Crane* v. *Kentucky*, 476 U. S. 683, 688–689 (1986), the legality of searches and seizures, Fed. Rule Crim. Proc. 12(b)(3), and the propriety of venue, see Fed. Rule Crim. Proc. 18, may be decided by the trial court.

Finally, the Government has not argued here that the error in this case was either harmless or not plain. Brief for United States 8, n. 5. As to the former, there is a "strong presumption" that a constitutional violation will be subject to harmless-error analysis. See *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). Accordingly, "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991); cf. *id.*, at 309–310 (listing examples of structural errors). In particular, the Court has subjected jury instructions plagued by constitutional error to harmless-error analysis. See, *e. g.*, *Yates* v. *Evatt*, 500 U. S. 391, 402 (1991) (taint of an unconstitutional burden-shifting jury instruction subject to harmless-error analysis); *Carella* v. *California*, 491 U. S. 263, 266 (1989) *(per curiam)* (jury instruction containing an erroneous mandatory presumption subject to harmless-error analysis); *Pope* v. *Illinois*, 481 U. S. 497, 502–504 (1987) (jury instruction misstating an element of an offense subject to harmless-error analysis); *Rose*, *supra*, at 581–582 (jury instruction containing an erroneous rebuttable presumption subject to harmless-error analysis); but see *Sullivan*, 508 U. S., at 280–282 (erroneous burden of proof instruction not subject to harmless-error analysis). The Court today has no occasion to review the Court of Appeals' conclusion that the constitutional error here "cannot be harmless." 28 F. 3d, at 951.

As to the latter, in *United States* v. *Olano*, 507 U. S. 725, 732 (1993), the Court noted the limitations on "plain error" review by the courts of appeals under Rule 52(b). "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.'" *Ibid.* Second, "the error [must] be 'plain.'" *Id.*, at 734. Thus, "[a]t a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Ibid.* Third, the plain error must "'affec[t] substantial rights,'" *ibid., i. e.,* "in most cases it means that the error must have been prejudicial," *ibid.* Finally, if these three prerequisites are met, the decision to correct forfeited error remains within the sound discretion of the court of appeals. A court of appeals, however, should not exercise that discretion unless the error "'"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."'" *Id.,* at 732.

In affirming the Court of Appeals, the Court concludes that "it is fair to say that we cannot hold for respondent today while still adhering to the reasoning and the holding of [*Sinclair* v. *United States,* 279 U. S. 263 (1929)]." *Ante,* at 519–520. Before today, every Court of Appeals that has considered the issue, except for the Ninth Circuit, has held that the question of materiality is one of law. See 28 F. 3d, at 955 (Kozinski, J., dissenting) (collecting cases). Thus, it is certainly subject to dispute whether the error in this case was "clear under current law." *Olano, supra,* at 734. The Court, however, does not review the Court of Appeals' determination that the failure to submit the issue of materiality to the jury constituted "plain error." 28 F. 3d, at 952.

VIMAR SEGUROS Y REASEGUROS, S. A. *v.* M/V SKY REEFER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 94–623. Argued March 20, 1995—Decided June 19, 1995

After a New York fruit distributor's produce was damaged in transit from Morocco to Massachusetts aboard respondent vessel, which was owned by respondent Panamanian company and chartered to a Japanese carrier, petitioner insurer paid the distributor's claim, and they both sued respondents under the standard form bill of lading tendered to the distributor by its Moroccan supplier. Respondents moved to stay the action and compel arbitration in Tokyo under the bill of lading's foreign arbitration clause and the Federal Arbitration Act (FAA). The District Court granted the motion, rejecting the argument of petitioner and the distributor that the arbitration clause was unenforceable under the FAA because, *inter alia*, it violated § 3(8) of the Carriage of Goods by Sea Act (COGSA) in that the inconvenience and costs of proceeding in Japan would "lesse[n] . . . liability" in the sense that COGSA prohibits. However, the court certified for interlocutory appeal its ruling to compel arbitration, stating that the controlling question of law was "whether [§ 3(8)] nullifies an arbitration clause contained in a bill of lading governed by COGSA." In affirming the order to arbitrate, the First Circuit expressed grave doubt whether a foreign arbitration clause lessened liability under § 3(8), but assumed the clause was invalid under COGSA and resolved the conflict between the statutes in the FAA's favor.

Held: COGSA does not nullify foreign arbitration clauses contained in maritime bills of lading. Pp. 533–541.

(a) Examined with care, § 3(8) does not support petitioner's argument that a foreign arbitration clause lessens COGSA liability by increasing the transaction costs of obtaining relief. Because it requires that the "liability" that may not be "lessen[ed]" "aris[e] from . . . failure in the duties or obligations provided in this section," § 3(8) is concerned with the liability imposed elsewhere in § 3, which defines that liability by explicit obligations and procedures designed to correct certain abuses by carriers, but does not address the separate question of the particular forum or other procedural enforcement mechanisms. Petitioner's contrary reading of § 3(8) is undermined by *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585, 595–596, whereas the Court's reading finds support in the goals of the so-called Hague Rules, the international convention on which COGSA is modeled, and in the pertinent decisions and statutes of other nations. It would be out of keeping with such goals and with contemporary principles of international comity and commercial practice to interpret COGSA to disparage the authority or competence of international forums for dispute resolution. The irony of petitioner's argument in favor of such an interpretation is heightened by the fact that the forum here is arbitration, for the FAA is also based in part on an international convention. For the United States to be able to gain the benefits of international accords, its courts must not construe COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law. Pp. 533–539.

(b) Also rejected is petitioner's argument that the arbitration clause should not be enforced because there is no guarantee foreign arbitrators will apply COGSA. According to petitioner, the arbitrators will follow the Japanese Hague Rules, which significantly lessen respondents' liability by providing carriers with a defense based on the acts or omissions of the stevedores hired by the shipper, rather than COGSA, which makes nondelegable the carrier's obligation to properly and carefully stow the goods carried. Whatever the merits of this comparative reading, petitioner's claim is premature because, at this interlocutory stage, it is not established what law the arbitrators will apply or that petitioner will receive diminished protection as a result. The District Court has retained jurisdiction over the case and will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the laws has been addressed. Pp. 539–541.

(c) In light of the foregoing, the relevant provisions of COGSA and the FAA are in accord, and both Acts may be given full effect. It is therefore unnecessary to resolve the further question whether the FAA would override COGSA were COGSA interpreted otherwise. P. 541.

29 F. 3d 727, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 541. STEVENS, J., filed a dissenting opinion, *post*, p. 542. BREYER, J., took no part in the consideration or decision of the case.

Stanley McDermott III argued the cause for petitioner. With him on the briefs was *Lawrence S. Robbins*.

Thomas H. Walsh, Jr., argued the cause for respondents. With him on the brief was *John J. Finn.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to interpret the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. App. § 1300 *et seq.*, as it relates to a contract containing a clause requiring arbitration in a foreign country. The question is whether a foreign arbitration clause in a bill of lading is invalid under COGSA because it lessens liability in the sense that COGSA prohibits. Our holding that COGSA does not forbid selection of the foreign forum makes it unnecessary to resolve the further question whether the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* (1988 ed. and Supp. V), would override COGSA were it interpreted otherwise. In our view, the relevant provisions of COGSA and the FAA are in accord, not in conflict.

I

The contract at issue in this case is a standard form bill of lading to evidence the purchase of a shipload of Moroccan oranges and lemons. The purchaser was Bacchus Associates (Bacchus), a New York partnership that distributes fruit at wholesale throughout the Northeastern United States. Bacchus dealt with Galaxie Negoce, S. A. (Galaxie), a Moroccan fruit supplier. Bacchus contracted with Galaxie to purchase the shipload of fruit and chartered a ship to transport it from Morocco to Massachusetts. The ship was the M/V Sky Reefer, a refrigerated cargo ship owned by M. H. Maritima, S. A., a Panamanian company, and time-chartered to Nichiro Gyogyo Kaisha, Ltd., a Japanese company. Stevedores hired by Galaxie loaded and stowed the cargo. As is customary in these types of transactions, when it received the cargo from Galaxie, Nichiro as carrier issued a form bill of lading to Galaxie as shipper and consignee. Once the ship set sail from Morocco, Galaxie tendered the bill of lading to Bacchus according to the terms of a letter of credit posted in Galaxie's favor.

**Marilyn L. Lytle* filed a brief for the American Association of Exporters and Importers et al. as *amici curiae* urging reversal.

Michael F. Sturley filed a brief for the American Steamship Owners Mutual Protection and Indemnity Association, Inc., et al. as *amici curiae* urging affirmance.

Among the rights and responsibilities set out in the bill of lading were arbitration and choice-of-law clauses. Clause 3, entitled "Governing Law and Arbitration," provided:

> "(1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.
>
> "(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties." App. 49.

When the vessel's hatches were opened for discharge in Massachusetts, Bacchus discovered that thousands of boxes of oranges had shifted in the cargo holds, resulting in over $1 million damage. Bacchus received $733,442.90 compensation from petitioner Vimar Seguros y Reaseguros (Vimar Seguros), Bacchus' marine cargo insurer that became subrogated *pro tanto* to Bacchus' rights. Petitioner and Bacchus then brought suit against Maritima *in personam* and M/V Sky Reefer *in rem* in the District Court for the District of Massachusetts under the bill of lading. These defendants, respondents here, moved to stay the action and compel arbitration in Tokyo under clause 3 of the bill of lading and § 3 of the FAA, which requires courts to stay proceedings and enforce arbitration agreements covered by the Act. Petitioner and Bacchus opposed the motion, arguing the arbitration clause was unenforceable under the FAA both because it was a contract of adhesion and because it violated COGSA § 3(8). The premise of the latter argument was that the inconvenience and costs of proceeding in Japan would "lesse[n] . . . liability" as those terms are used in COGSA.

The District Court rejected the adhesion argument, observing that Congress defined the arbitration agreements enforceable under the FAA to include maritime bills of lading, 9 U. S. C. § 1, and that petitioner was a sophisticated party familiar with the negotiation of maritime shipping transactions. It also rejected the argument that requiring the parties to submit to arbitration would lessen respondents' liability under COGSA § 3(8). The court granted the motion to stay judicial proceedings and to compel arbitration; it retained jurisdiction pending arbitration; and at petitioner's request, it certified for interlocutory appeal under 28 U. S. C. § 1292(b) its ruling to compel arbitration, stating that the controlling question of law was "whether [COGSA § 3(8)] nullifies an arbitration clause contained in a bill of lading governed by COGSA." Pet. for Cert. 30a.

The First Circuit affirmed the order to arbitrate. 29 F. 3d 727 (1994). Although it expressed grave doubt whether a foreign arbitration clause lessened liability under COGSA § 3(8), *id.*, at 730, the Court of Appeals assumed the clause was invalid under COGSA and resolved the conflict between the statutes in favor of the FAA, which it considered to be the later enacted and more specific statute, *id.*, at 731–733. We granted certiorari, 513 U. S. 1013 (1995), to resolve a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading. Compare the case below (enforcing foreign arbitration clause assuming *arguendo* it violated COGSA), with *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F. 2d 1576 (CA11) (declining to enforce foreign arbitration clause because that would violate COGSA), cert. denied, 488 U. S. 916 (1988). We now affirm.

II

The parties devote much of their argument to the question whether COGSA or the FAA has priority. "[W]hen two statutes are capable of co-existence," however, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari,* 417 U. S. 535, 551 (1974); *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Assn.,* 491 U. S. 490, 510 (1989). There is no conflict unless COGSA by its own terms nullifies a foreign arbitration clause, and we choose to address that issue rather than assume nullification *arguendo,* as the Court of Appeals did. We consider the two arguments made by petitioner. The first is that a foreign arbitration clause lessens COGSA liability by increasing the transaction costs of obtaining relief. The second is that there is a risk foreign arbitrators will not apply COGSA.

A

The leading case for invalidation of a foreign forum selection clause is the opinion of the Court of Appeals for the Second Circuit in *Indussa Corp.* v. *S. S. Ranborg,* 377 F. 2d 200 (1967) (en banc). The court there found that COGSA invalidated a clause designating a foreign judicial forum because it "puts 'a high hurdle' in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo [owners] could sue in a convenient forum." *Id.,* at 203 (citation omitted). The court observed "there could be no assurance that [the foreign court] would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court." *Id.,* at 203–204. Following *Indussa,* the Courts of Appeals without exception have invalidated foreign forum selection clauses under § 3(8). See *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon,* 642 F. 2d 721, 723–725 (CA4 1981); *Conklin & Garrett, Ltd* v. *M/V Finnrose,* 826 F. 2d 1441, 1442–1444 (CA5 1987); see also G. Gilmore & C. Black, Law of Admiralty

145–146, n. 23 (2d ed. 1975) (approving *Indussa* rule). As foreign arbitration clauses are but a subset of foreign forum selection clauses in general, *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974), the *Indussa* holding has been extended to foreign arbitration clauses as well. See *State Establishment for Agricultural Product Trading, supra*, at 1580–1581; cf. *Vimar Seguros y Reaseguros, supra*, at 730, (assuming, *arguendo*, *Indussa* applies). The logic of that extension would be quite defensible, but we cannot endorse the reasoning or the conclusion of the *Indussa* rule itself.

The determinative provision in COGSA, examined with care, does not support the arguments advanced first in *Indussa* and now by petitioner. Section 3(8) of COGSA provides as follows:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." 46 U. S. C. App. § 1303(8).

The liability that may not be lessened is "liability for loss or damage . . . arising from negligence, fault, or failure in the duties and obligations provided in this section." The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.

The liability imposed on carriers under COGSA § 3 is defined by explicit standards of conduct, and it is designed to correct specific abuses by carriers. In the 19th century it was a prevalent practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package. See 2A M. Sturley, Benedict on Admiralty § 11, pp. 2–2 to 2–3 (1995); 2 T. Schoenbaum, Admiralty and Maritime Law § 10–13 (2d ed. 1994); Yancey, The Carriage of Goods: Hague, COGSA, Visby, and Hamburg, 57 Tulane L. Rev. 1238, 1239–1240 (1983). Thus, § 3, entitled "Responsibilities and liabilities of carrier and ship," requires that the carrier "exercise due diligence to . . . [m]ake the ship seaworthy" and "[p]roperly man, equip, and supply the ship" before and at the beginning of the voyage, § 3(1), "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried," § 3(2), and issue a bill of lading with specified contents, § 3(3). 46 U. S. C. App. §§ 1303(1), (2), and (3). Section 3(6) allows the cargo owner to provide notice of loss or damage within three days and to bring suit within one year. These are the substantive obligations and particular procedures that § 3(8) prohibits a carrier from altering to its advantage in a bill of lading. Nothing in this section, however, suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum. By its terms, it establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement.

Petitioner's contrary reading of § 3(8) is undermined by the Court's construction of a similar statutory provision in *Carnival Cruise Lines, Inc.* v. *Shute,* 499 U. S. 585 (1991). There a number of Washington residents argued that a Florida forum selection clause contained in a cruise ticket should not be enforced because the expense and inconvenience of litigation in Florida would "caus[e] plaintiffs unreasonable hardship in asserting their rights," *id.*, at 596, and therefore " 'lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for . . . loss or injury, or the measure of damages therefor' " in violation of the Limitation of Vessel Owner's Liability Act, *id.*, at 595–596 (quoting 46 U. S. C. App. § 183c). We observed that the clause "does not purport to limit petitioner's liability for negligence," 499 U. S., at 596–597, and enforced the agreement over the dissent's argument, based in part on the *Indussa* line of cases, that the cost and inconvenience of traveling thousands of miles "lessens or weakens [plaintiffs'] ability to recover," 499 U. S., at 603 (STEVENS, J., dissenting).

If the question whether a provision lessens liability were answered by reference to the costs and inconvenience to the cargo owner, there would be no principled basis for distinguishing national from foreign arbitration clauses. Even if it were reasonable to read § 3(8) to make a distinction based on travel time, airfare, and hotels bills, these factors are not susceptible of a simple and enforceable distinction between domestic and foreign forums. Requiring a Seattle cargo owner to arbitrate in New York likely imposes more costs and burdens than a foreign arbitration clause requiring it to arbitrate in Vancouver. It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.

Our reading of "lessening such liability" to exclude increases in the transaction costs of litigation also finds support in the goals of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924) (Hague Rules), on which COGSA is modeled. Sixty-six countries, including the United States and Japan, are now parties to the Convention, see Department of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1994, p. 367 (June 1994), and it appears that none has interpreted its enactment of § 3(8) of the Hague Rules to prohibit foreign forum selection clauses, see Sturley, International Uniform Laws in National Courts:

The Influence of Domestic Law in Conflicts of Interpretation, 27 Va. J. Int'l L. 729, 776–796 (1987). The English courts long ago rejected the reasoning later adopted by the *Indussa* court. See *Maharani Woollen Mills Co.* v. *Anchor Line*, [1927] 29 Lloyd's List L. Rep. 169 (C. A.) (Scrutton, L. J.) ("[T]he liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure—where shall the law be enforced?—and I do not read any clause as to procedure as lessening liability"). And other countries that do not recognize foreign forum selection clauses rely on specific provisions to that effect in their domestic versions of the Hague Rules, see, *e. g.*, Sea-Carriage of Goods Act 1924, § 9(2) (Australia); Carriage of Goods by Sea Act, No. 1 of 1986, § 3 (South Africa). In light of the fact that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade," *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 301 (1959), we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue. See Sturley, *supra*, at 736 (conflicts in the interpretation of the Hague Rules not only destroy esthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern).

It would also be out of keeping with the objects of the Convention for the courts of this country to interpret COGSA to disparage the authority or competence of international forums for dispute resolution. Petitioner's skepticism over the ability of foreign arbitrators to apply COGSA or the Hague Rules, and its reliance on this aspect of *Indussa Corp.* v. *S. S. Ranborg*, 377 F. 2d 200 (CA2 1967), must give way to contemporary principles of international comity and commercial practice. As the Court observed in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), when it enforced a foreign forum selection clause, the historical judicial resistance to foreign forum selection clauses "has little place in an era when . . . businesses once essentially local now operate in world markets." *Id.*, at 12. "The expansion of American business and industry will hardly be encouraged," we explained, "if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Id.*, at 9. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 638 (1985) (if international arbitral institutions "are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration,' and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal") (citation omitted); *Scherk* v. *Alberto-Culver Co.*, 417 U. S., at 516 ("A parochial refusal by the courts of one country to enforce an international arbitration agreement" would frustrate "the orderliness and predictability essential to any international business transaction"); see also Allison, Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market, 18 N. Y. U. J. Int'l Law & Pol. 361, 439 (1986).

That the forum here is arbitration only heightens the irony of petitioner's argument, for the FAA is also based in part on an international convention, 9 U. S. C. § 201 *et seq.* (codifying the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, [1970] 21 U. S. T. 2517, T. I. A. S. No. 6997), intended "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries," *Scherk*, *supra*, at 520, n. 15. The FAA requires enforcement of arbitration agreements in contracts that involve interstate commerce, see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995), and in maritime transactions, including bills of lading, see 9 U. S. C. §§1, 2, 201, 202, where there is no independent basis in law or equity for revocation, cf. *Carnival Cruise Lines,* 499 U. S., at 595 ("[F]orum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness"). If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.

B

Petitioner's second argument against enforcement of the Japanese arbitration clause is that there is no guarantee foreign arbitrators will apply COGSA. This objection raises a concern of substance. The central guarantee of §3(8) is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. The relevant question, therefore, is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees. See *Mitsubishi Motors, supra,* at 637, n. 19.

Petitioner argues that the arbitrators will follow the Japanese Hague Rules, which, petitioner contends, lessen respondents' liability in at least one significant respect. The Japanese version of the Hague Rules, it is said, provides the carrier with a defense based on the acts or omissions of the stevedores hired by the shipper, Galaxie, see App. 112, Article 3(1) (carrier liable "when he or the persons employed by him" fail to take due care), while COGSA, according to petitioner, makes nondelegable the carrier's obligation to "properly and carefully . . . stow . . . the goods carried," COGSA §3(2), 46 U. S. C. App. §1303(2); see *Associated Metals &*

Minerals Corp. v. *M/V Arktis Sky,* 978 F. 2d 47, 50 (CA2 1992). But see COGSA § 4(2)(i), 46 U. S. C. App. § 1304(2)(i) ("Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . [a]ct or omission of the shipper or owner of the goods, his agent or representative"); COGSA § 3(8), 46 U. S. C. App. § 1303(8) (agreement may not relieve or lessen liability "otherwise than as provided in this chapter"); Hegarty, A COGSA Carrier's Duty to Load and Stow Cargo is Nondelegable, or Is It?: *Associated Metals & Minerals Corp.* v. *M/V Arktis Sky,* 18 Tulane Mar. L. J. 125 (1993).

Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature. At this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls. Respondents seek only to enforce the arbitration agreement. The District Court has retained jurisdiction over the case and "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." *Mitsubishi Motors, supra,* at 638; cf. 1 Restatement (Third) of Foreign Relations Law of the United States § 482(2)(d) (1986) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself, is repugnant to the public policy of the United States"). Were there no subsequent opportunity for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors, supra,* at 637, n. 19. Cf. *Knott* v. *Botany Mills,* 179 U. S. 69 (1900) (nullifying choice-of-law provision under the Harter Act, the statutory precursor to COGSA, where British law would give effect to provision in bill of lading that purported to exempt carrier from liability for damage to goods caused by carrier's negligence in loading and stowage of cargo); *The Hollandia*, [1983] A. C. 565, 574–575 (H. L. 1982) (noting choice-of-forum clause "does not ex facie offend against article III, paragraph 8," but holding clause unenforceable where "the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if [English COGSA] applied"). Under the circumstances of this case, however, the First Circuit was correct to reserve judgment on the choice-of-law question, 29 F. 3d, at 729, n. 3, as it must be decided in the first instance by the arbitrator, cf. *Mitsubishi Motors*, 473 U. S., at 637, n. 19. As the District Court has retained jurisdiction, mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents' legal obligations, does not in and of itself lessen liability under COGSA § 3(8).

Because we hold that foreign arbitration clauses in bills of lading are not invalid under COGSA in all circumstances, both the FAA and COGSA may be given full effect. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER took no part in the consideration or decision of this case.

JUSTICE O'CONNOR, concurring in the judgment.

I agree with what I understand to be the two basic points made in the Court's opinion. First, I agree that the language of the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. App. § 1300 *et seq.*, and our decision in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585 (1991), preclude a holding that the increased cost of litigating in a distant forum, without more, can lessen liability within the meaning of COGSA § 3(8). *Ante*, at 534–536. Second, I agree that, because the District Court has retained jurisdiction over this case while the arbitration proceeds, any claim of lessening of liability that might arise out of the arbitrators' interpretation of the bill of lading's choice-of-law clause, or out of their application of COGSA, is premature. *Ante*, at 539–541. Those two points suffice to affirm the decision below.

Because the Court's opinion appears to do more, however, I concur only in the judgment. Foreign arbitration clauses of the kind presented here do not divest domestic courts of jurisdiction, unlike true foreign forum selection clauses such as that considered in *Indussa Corp.* v. *S. S. Ranborg*, 377 F. 2d 200 (CA2 1967) (en banc). That difference is an important one—it is, after all, what leads the Court to dismiss much of petitioner's argument as premature—and we need not decide today whether *Indussa*, insofar as it relied on considerations other than the increased cost of litigating in a distant forum, retains any vitality in the context of true foreign forum selection clauses. Accordingly, I would not, without qualification, reject "the reasoning [and] the conclusion of the *Indussa* rule itself," *ante*, at 534, nor would I wholeheartedly approve an English decision that "long ago rejected the reasoning later adopted by the *Indussa* court," *ante*, at 537. As the Court notes, "[f]ollowing *Indussa*, the Courts of Appeals without exception have invalidated foreign forum selection clauses under § 3(8)." *Ante*, at 533. I would prefer to disturb that unbroken line of authority only to the extent necessary to decide this case.

JUSTICE STEVENS, dissenting.

The Carriage of Goods by Sea Act (COGSA),[1] enacted in 1936 as a supplement to the 1893 Harter Act,[2] regulates the terms of bills of lading issued by ocean carriers transporting cargo to or from ports of the United States. Section 3(8) of COGSA provides:

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[1] 49 Stat. 1207, 46 U. S. C. App. §§ 1300–1315.

[2] 27 Stat. 445, 46 U. S. C. App. §§ 190–196.

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." 46 U. S. C. App. § 1303(8).

Petitioners in this case challenge the enforceability of a foreign arbitration clause, coupled with a choice-of-foreign-law clause, in a bill of lading covering a shipment of oranges from Morocco to Boston, Massachusetts. The bill, issued by the Japanese carrier, provides (1) that the transaction " 'shall be governed by the Japanese law,' " and (2) that any dispute arising from the bill shall be arbitrated in Tokyo. See *ante*, at 531. Under the construction of COGSA that has been uniformly followed by the Courts of Appeals and endorsed by scholarly commentary for decades, both of those clauses are unenforceable against the shipper because they "relieve" or "lessen" the liability of the carrier. Nevertheless, relying almost entirely on a recent case involving a domestic forum selection clause that was not even covered by COGSA, *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585 (1991), the Court today unwisely discards settled law and adopts a novel construction of § 3(8).

I

In the 19th century it was common practice for shipowners to issue bills of lading that included stipulations exempting themselves from liability for losses occasioned by the negligence of their employees. Because a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around these no-liability clauses. Although the English courts enforced the stipulations, see *Compania de Navigacion la Flecha* v. *Brauer*, 168 U. S. 104, 117–118 (1897), citing *Peck* v. *North Staffordshire Railway*, 10 H. L. Cas. 473, 493, 494 (1863), this Court concluded, even prior to the 1893 enactment of the Harter Act, that they were "contrary to public policy, and consequently void," *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442 (1889).[3] As we noted in *Brauer*, several District Courts had held that such a stipulation was invalid even when the bill of lading also contained a choice-of-law clause providing that "the contract should be governed by the law of England." 168 U. S., at 118. The question whether such a choice-of-law clause was itself valid remained open in this Court until the Harter Act was passed in 1893.

Section 1 of the Harter Act makes it unlawful for the master or owner of any vessel transporting cargo between ports of the United States and foreign ports to insert in any bill of lading any clause whereby the carrier "shall be relieved from liability for loss or damage arising from negligence."[4] In

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[3] In support of its holding in *Liverpool Steam*, the Court observed:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business." 129 U. S., at 441.

[4] The first section of the Harter Act provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or ship-

Knott v. *Botany Mills,* 179 U. S. 69 (1900), we were presented with the question whether that prohibition applied to a bill of lading containing a choice-of-law clause designating British law as controlling. The Court held:

> "Th[e] express provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag." *Id.,* at 77.

The Court's holding that the choice-of-law clause was invalid rested entirely on the Harter Act's prohibition against relieving the carrier from liability. *Id.,* at 72. Since *Knott,* courts have consistently understood the Harter Act to create a flat ban on foreign choice-of-law clauses in bills of lading. See, *e. g., Conklin & Garrett, Ltd.* v. *M/V Finnrose,* 826 F. 2d 1441, 1442–1444 (CA5 1987); *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon,* 642 F. 2d 721, 723–725 (CA4 1981); *Indussa Corp.* v. *S. S. Ranborg,* 377 F. 2d 200 (CA2 1967). Courts have also consistently found such clauses invalid under COGSA, which embodies an even broader prohibition against clauses "relieving" *or "lessening"* a carrier's liability. Indeed, when a panel of the Second Circuit in 1955 interpreted COGSA to permit a foreign choice-of-law clause, *Muller* v. *Swedish American Line Ltd.,* 224 F. 2d 806, scholars noted that "the case seems impossible to reconcile with the holding in *Knott.*"[5] Eventually agreeing, the en banc court unanimously overruled *Muller* in 1967. *Indussa Corp.,* 377 F. 2d, at 200.

In the 1957 edition of their treatise on the Law of Admiralty, Gilmore and Black had criticized not only the choice-

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ping receipts shall be null and void and of no effect." 27 Stat. 445, 46 U. S. C. App. § 190.

This section was rendered obsolete by § 3(8) of COGSA, a broader prohibition that invalidates clauses either "relieving" or "lessening" a carrier's liability. 46 U. S. C. App. § 1303(8), quoted *supra,* at 543.

[5] G. Gilmore & C. Black, Law of Admiralty 125, n. 23 (1st ed. 1957).

of-law holding in *Muller,* but also its enforcement of a foreign choice-of-forum clause. They wrote:

> "The stipulation for suit abroad seems also to offend Cogsa, most obviously because it destroys the shipper's certainty that Cogsa will be applied. Further, it is entirely unrealistic to look on an obligation to sue overseas as not 'lessening' the liability of the carrier. It puts a high hurdle in the way of enforcing that liability." G. Gilmore & C. Black, Law of Admiralty 125, n. 23.

Judge Friendly's opinion for the en banc court in *Indussa* endorsed this reasoning. In *Indussa,* the bill of lading contained a provision requiring disputes to be resolved in Norway under Norwegian law.[6] Judge Friendly first remarked on the harsh consequence of "requiring an American consignee claiming damages in the modest sum of $2,600 to journey some 4200 miles to a court having a different legal system and employing another language." 377 F. 2d, at 201. The decision, however, rested not only on the impact of the provision on a relatively small claim, but also on a fair reading of the broad language in COGSA. Judge Friendly explained:

> "[Section] 3(8) of COGSA says that 'any clause, covenant, or agreement in a contract of carriage * * * lessening [the carrier's liability for negligence, fault, or dereliction of statutory duties] otherwise than as provided in this Act, shall be null and void and of no effect.' From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts 'a high hur-

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[6] The bill of lading contained the following provision:

"'Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.'" *Indussa Corp.* v. *S. S. Ranborg,* 377 F. 2d 200, 201 (CA2 1967).

> dle' in the way of enforcing liability, Gilmore & Black, supra, 125 n. 23, and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum. A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability." *Id.*, at 203–204 (citations omitted).

As the Court notes, *ante*, at 533, the Courts of Appeals without exception have followed *Indussa*. In the 1975 edition of their treatise, Gilmore and Black also endorsed its holding, adding this comment:

> "Cogsa allows a freedom of contracting out of its terms, but only in the direction of *increasing* the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and Cogsa were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading. Obviously, the latter result can never ensue from the increase of the carrier's duties." G. Gilmore & C. Black, Law of Admiralty 145–147 (2d ed.) (emphasis in original; footnote omitted).

Thus, our interpretation of maritime law prior to the enactment of the Harter Act, our reading of that statute in *Knott*, and the federal courts' consistent interpretation of

COGSA, buttressed by scholarly recognition of the commercial interest in uniformity, demonstrate that the clauses in the Japanese carrier's bill of lading purporting to require arbitration in Tokyo pursuant to Japanese law both would have been held invalid under COGSA prior to today.[7]

The foreign-arbitration clause imposes potentially prohibitive costs on the shipper, who must travel—and bring his lawyers, witnesses, and exhibits—to a distant country in order to seek redress. The shipper will therefore be inclined either to settle the claim at a discount or to forgo bringing the claim at all. The foreign-law clause leaves the shipper who does pursue his claim open to the application of unfamiliar and potentially disadvantageous legal standards, until he can obtain review (perhaps years later) in a domestic forum under the high standard applicable to vacation of arbitration awards.[8] See *Wilko* v. *Swan*, 346 U. S. 427, 436–437

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[7] Of course, the objectionable feature in the instant bill of lading is a foreign arbitration clause, not a foreign forum selection clause. But this distinction is of little importance; in relevant respects, there is no difference between the two. Both impose substantial costs on shippers, and both should be held to lessen liability under COGSA. The majority's reasoning to the contrary thus presumably covers forum selection as well as arbitration. See *ante*, at 533–534; *ante*, at 542 (O'CONNOR, J., concurring in judgment). The only ground on which one might distinguish the two types of clauses is that another federal statute, the Federal Arbitration Act, makes arbitration clauses enforceable, whereas no analogous federal statute exists for forum selection clauses. For the reasons expressed *infra*, at 554–556, this distinction is unpersuasive.

[8] I am assuming that the majority would not actually uphold the application of disadvantageous legal standards—these, even under the narrowest reading of COGSA, surely lessen liability. See *ante*, at 539–541. Nonetheless, the majority is apparently willing to allow arbitration to proceed under foreign law, and to determine afterwards whether application of that law has actually lessened the carrier's formal liability. As I have discussed above, this regime creates serious problems of delay and uncertainty. Because the majority's holding in this case is limited to the enforceability of the foreign arbitration clause—it does not actually pass upon the validity of the foreign-law clause—I will not discuss the foreign-law clause further except to say that it is an unenforceable lessening of

(1953). Accordingly, courts have always held that such clauses "lessen" or "relieve" the carrier's liability, see, *e. g.*, *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F. 2d 1576, 1580–1582 (CA11), cert. denied, 488 U. S. 916 (1988), and even the Court of Appeals in this case assumed as much, 29 F. 3d 727, 730, 732, n. 5 (CA1 1994).[9] Yet this Court today holds that carriers may insert foreign-arbitration clauses into bills of lading, and it leaves in doubt the validity of choice-of-law clauses.

Although the policy undergirding the doctrine of *stare decisis* has its greatest value in preserving rules governing commercial transactions, particularly when their meaning is well understood and has been accepted for long periods of time,[10] the Court nevertheless has concluded that a change must be made. Its law-changing decision is supported by three arguments: (1) the statutory reference to "lessening such liability" has been misconstrued; (2) the prior understanding of the meaning of the statute has been "undermined" by the *Carnival Cruise* case; and (3) the new rule is supported by our obligation to honor the 1924 "Hague Rules." None of these arguments is persuasive.

II

The Court assumes that the words "lessening such liability" must be narrowly construed to refer only to the substantive rules that define the carrier's legal obligations. *Ante*, at 534–535. Under this view, contractual provisions that lessen the amount of the consignee's net recovery, or that

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liability to the extent it gives an advantage to the carrier at the expense of the shipper.

[9] The Court of Appeals enforced the arbitration clause, despite its concession that the clause might violate COGSA, because of its perception that COGSA must give way to the conflicting dictate of the Federal Arbitration Act. 29 F. 3d, at 731–733. I consider, and reject, this argument *infra*, at 554–556.

[10] See Eskridge & Frickey, The Supreme Court 1993 Term—Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 81 (1994).

lessen the likelihood that it will make any recovery at all, are beyond the scope of the statute.

In my opinion, this view is flatly inconsistent with the purpose of COGSA § 3(8). That section responds to the inequality of bargaining power inherent in bills of lading and to carriers' historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault. A bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis. See Black, The Bremen, COGSA and the Problem of Conflicting Interpretation, 6 Vand. J. Transnat'l L. 365, 368 (1973); *Liverpool Steam,* 129 U. S., at 441. Characteristically, there is no arm's-length negotiation over the bill's terms; the shipper must agree to the carrier's standard-form language, or else refrain from using the carrier's services. Accordingly, if courts were to enforce bills of lading as written, a carrier could slip in a clause relieving itself of all liability for fault, or limiting that liability to a fraction of the shipper's damages, and the shipper would have no recourse.[11] COGSA represents Congress' most recent attempt to respond to this problem. By its terms, it invalidates any clause in a bill of lading "relieving" or "lessening" the "liability" of the carrier for negligence, fault, or dereliction of duty.

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[11] See *United States* v. *Farr Sugar Corp.,* 191 F. 2d 370, 374 (CA2 1951), aff'd, 343 U. S. 236 (1952):

"One other fact requires special note. The shipowners stress the consensual nature of the ["Both-to-Blame"] clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law." (Citations omitted.)

When one reads the statutory language in light of the policies behind COGSA's enactment, it is perfectly clear that a foreign forum selection or arbitration clause "relieves" or "lessens" the carrier's liability. The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability. It seems to me that a contractual provision that entirely protects the shipper from being held liable for anything should be construed either to have "lessened" its liability or to have "relieved" it of liability.

Even if the value of the shipper's claim is large enough to justify litigation in Asia,[12] contractual provisions that impose unnecessary and unreasonable costs on the consignee will inevitably lessen its net recovery. If, as under the Court's reasoning, such provisions do not affect the carrier's legal liability, it would appear to be permissible to require the consignee to pay the costs of the arbitration, or perhaps the travel expenses and fees of the expert witnesses, interpreters, and lawyers employed by both parties. Judge Friendly and the many other wise judges who shared his opinion were surely correct in concluding that Congress could not have intended such a perverse reading of the statutory text.

More is at stake here than the allocation of rights and duties between shippers and carriers. A bill of lading, besides being a contract of carriage, is a negotiable instrument that controls possession of the goods being shipped. Accordingly, the bill of lading can be sold, traded, or used to obtain credit as though the bill were the cargo itself. Disuniformity in the interpretation of bills of lading will impair their negotiability. See *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon,* 642 F. 2d, at 723; G. Gilmore & C. Black, Law of Admiralty 146–147 (2d ed. 1975). Thus, if the security interests in some bills of lading are enforceable only through the courts of Japan, while others may be enforceable only in Liechtenstein, the negotiability of bills of lading will suffer from the uncertainty. COGSA recognizes that this negotiability depends in part upon the financial community's capacity to rely on the enforceability, in an accessible forum, of the bills' terms. Today's decision destroys that capacity.

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[12] The majority's reasoning is not, of course, limited to foreign forums as accessible as Tokyo. A carrier who truly wished to relieve itself of liability might select an outpost in Antarctica as the setting for arbitration of all claims. Under the Court's reasoning, such a clause presumably would be enforceable.

The Court's reliance on its decision in *Carnival Cruise Lines, Inc.* v. *Shute,* 499 U. S. 585 (1991), is misplaced. That case held that a domestic forum selection clause in a passenger ticket was enforceable. As no carriage of goods was at issue, COGSA did not apply to the parties' dispute. Accordingly, the enforceability of the ticket's terms did not implicate the commercial interests in uniformity and negotiability that are served by the statutory regulation of bills of lading. Moreover, the *Carnival Cruise* holding is limited to the enforceability of *domestic* forum selection clauses. The Court in that case pointedly refused to respond to the concern expressed in my dissent that a wooden application of its reasoning might extend its holding to the selection of a forum outside of the United States. See *id.,* at 604. The wooden reasoning that the Court adopts today does make that extension, but it is surely not compelled by the holding in *Carnival Cruise.*[13]

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[13] Nor is it compelled by logic. It is true that some domestic forums are more distant than some foreign forums—a citizen of Maine may have less trouble arbitrating in Canada than in Arizona. But that is no reason to eschew any distinction between foreign and domestic forums. If it is to adhere to *Carnival Cruise* and yet avoid an outrageous result, the Court must draw a line somewhere. The most sensible line, it seems to me, is at the United States border. Transaction costs generally, though not always, increase when that line is crossed. Passports usually must be obtained, language barriers often present themselves, and distances

Finally, I am simply baffled by the Court's implicit suggestion that our interpretation of the Harter Act (which preceded the Hague Rules), and the federal courts' consistent interpretation of COGSA since *Indussa* was decided in 1967, has somehow been unfaithful to our international commitments. See *ante,* at 536–539. The concerns about invalidating freely negotiated forum selection clauses that this Court expressed in *The Bremen* v. *Zapata Off-Shore Co.,* 407 U. S. 1 (1972), have no bearing on the validity of the provisions in bills of lading that are commonly recognized as contracts of adhesion. Our international obligations do not require us to enforce a contractual term that was not freely negotiated by the parties. Much less do they require us to ignore the clear meaning of COGSA—itself the product of international negotiations—which forbids enforcement of clauses lessening the carrier's liability. Indeed, discussing *The Bremen*'s impact on COGSA, Professor Black observed:

> "[I]t is hard to see how it can be looked on as other than a 'lessening' of the carrier's liability under COGSA to remit the bill of lading holder to a distant foreign court. It is quite true that the difficulty imposed would vary with circumstances; Canada is not Pakistan. But there is always some palpable 'lessening,' for if the choice-of-forum clause is ever enforced, the result must be to dismiss the litigant out of the United States court he has chosen to sue in. On most moderate-sized claims, remission to the foreign forum is a practical immunization of the carrier from liability." 6 Vand. J. Transnat'l L., at 368–369.

The majority points to several foreign statutes, passed by other signatories to the Hague Rules, that make foreign forum selection clauses unenforceable in the courts of those

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are usually greater when litigants are forced to cross that boundary. I think *Carnival Cruise* was wrongly decided, but adherence to the holding in that case does not require the result the majority reaches today.

countries. See *ante,* at 537. The majority assumes (without citing any evidence) that these statutes were passed in order to depart from the Hague Rules, and that COGSA, our Nation's enactment of the Hague Rules, should therefore be read to mean something different from these statutes. I think the opposite conclusion is at least as plausible: These foreign nations believed nonenforcement of foreign forum selection clauses was consistent with their international obligations, and they passed these statutes to make that explicit. If anything, then, these statutes demonstrate that several foreign countries agree that the United States courts' consistent interpretation of COGSA does not contravene our mutual treaty obligations. Moreover, because Congress is presumed to know the law, *Cannon* v. *University of Chicago,* 441 U. S. 677, 696–699 (1979), it has been justified in assuming, based on the courts' uniform interpretation of COGSA prior to today, that no specific statute such as Australia's or South Africa's was necessary to invalidate foreign forum selection and arbitration clauses. The existence of these foreign statutes, then, proves nothing at all.[14]

III

Lurking in the background of the Court's decision today is another possible reason for holding, despite the clear meaning of COGSA and decades of precedent, that a foreign arbitration clause does not lessen liability. It may be that the Court does violence to COGSA in order to avoid a perceived conflict with another federal statute, the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* (1988 ed. and Supp. V). The FAA requires that courts enforce arbitration clauses in contracts—including those requiring arbitration in foreign countries—the same way they would enforce any other contractual clause. See, *e. g., Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989). This statute was designed to overturn the traditional common-law hostility to arbitration clauses. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 55 (1995); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 270 (1995). According to the Court of Appeals, reading COGSA to invalidate foreign arbitration clauses would conflict directly with the terms and policy of the FAA.

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[14] The majority's puzzling reference to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *ante,* at 538, strikes me as irrelevant. Nothing in that treaty even remotely suggests an intent to enforce arbitration clauses that constitute a "lessening" of liability under COGSA or the Hague Rules.

Unfortunately, in adopting a contrary reading to avoid this conflict, the Court has today deprived COGSA § 3(8) of much of its force. The Court's narrow reading of "lessening [of] liability" excludes more than arbitration; it apparently covers only formal, legal liability. See *supra*, at 551–552. Although I agree with the Court that it is important to read potentially conflicting statutes so as to give effect to both wherever possible, I think the majority has ignored a much less damaging way to harmonize COGSA with the FAA.

Section 2 of the FAA reads:

> "A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

This language plainly intends to place arbitration clauses upon the same footing as all other contractual clauses. Thus, like any clause, an arbitration clause is enforceable, "save upon such grounds" as would suffice to invalidate any other, nonarbitration clause. The FAA thereby fulfills its policy of jettisoning the prior regime of hostility to arbitration. Like any other contractual clause, then, an arbitration clause may be invalid without violating the FAA if, for example, it is procured through fraud or forgery; there is mutual mistake or impossibility; the provision is unconscionable; or, as in this case, the terms of the clause are illegal under a separate federal statute which does not evidence a hostility to arbitration. Neither the terms nor the policies of the FAA would be thwarted if the Court were to hold today that a foreign arbitration clause in a bill of lading "lessens liability" under COGSA. COGSA does not single out arbitration clauses for disfavored treatment; it invalidates any clause that lessens the carrier's liability. Illegality under COGSA is therefore an independent ground "for the revocation of any contract," under FAA § 2. There is no conflict between the two federal statutes.

The correctness of this construction becomes even more apparent when one considers the policies of the two statutes. COGSA seeks to ameliorate the inequality in bargaining power that comes from a particular form of adhesion contract. The FAA seeks to ensure enforcement of freely negotiated agreements to arbitrate. *Volt*, 489 U. S., at 478–479. As I have discussed, *supra*, at 543–544, 550, foreign arbitration clauses in bills of lading are not freely negotiated. COGSA's policy is thus directly served by making these clauses illegal; and the FAA's policy is not disserved thereby. In contrast, allowing such adhesionary clauses to stand serves the goals of neither statute.

IV

The Court's decision in this case is an excellent example of overzealous formalism. By eschewing a commonsense reading of "lessening [of] liability," the Court has drained those words of much of their potency. The result compounds, rather than contains, the Court's unfortunate mistake in the *Carnival Cruise* case.

I respectfully dissent.

HURLEY ET AL. *v.* IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 94–749. Argued April 25, 1995—Decided June 19, 1995

Petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various veterans groups, was authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade. The Council refused a place in the 1993 event to respondent GLIB, an organization formed for the purpose of marching in the parade in order to express its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York St. Patrick's Day parade. GLIB and some of its members filed this suit in state court, alleging that the denial of their application to march violated, *inter alia*, a state law prohibiting discrimination on account of sexual orientation in places of public accommodation. In finding such a violation and ordering the Council to include GLIB in the parade, the trial court, among other things, concluded that the parade had no common theme other than the involvement of the participants, and that, given the Council's lack of selectivity in choosing parade participants and its failure to circumscribe the marchers' messages, the parade lacked any expressive purpose, such that GLIB's inclusion therein would not violate the Council's First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed.

Held: The state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violates the First Amendment. Pp. 566–581.

(a) Confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the realm of nonexpressive conduct, this Court has a constitutional duty to conduct an independent examination of the record as a whole, without deference to those courts, to assure that their judgment does not constitute a forbidden intrusion on the field of free expression. See, *e. g., New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285. Pp. 566–568.

(b) The selection of contingents to make a parade is entitled to First Amendment protection. Parades such as petitioners' are a form of protected expression because they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Cf., *e. g., Gregory* v. *Chicago,* 394 U. S. 111, 112. Moreover, such protection is not limited to a parade's banners and songs, but extends to symbolic acts. See, *e. g., West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 632, 642. Although the Council has been rather lenient in admitting participants to its parade, a private speaker does not forfeit constitutional protection simply by combining multifarious voices, by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech, or by failing to generate, as an original matter, each item featured in the communication. Thus, petitioners are entitled to protection under the First Amendment. GLIB's participation as a unit in the parade was equally expressive, since the organization was formed to celebrate its members' sexual identities and for related purposes. Pp. 568–570.

(c) The Massachusetts law does not, as a general matter, violate the First or Fourteenth Amendments. Its provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against. And the statute does not, on its face, target speech or discriminate on the basis of its content. Pp. 571–572.

(d) The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say. Petitioners' claim to the benefit of this principle is sound, since the Council selects the expressive units of the parade from potential participants and clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another, free from state interference. The constitutional violation is not saved by *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622. The Council is a speaker in its own right; a parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience; and there is no assertion here that some speakers will be destroyed in the absence of the Massachusetts law. Nor has any other legitimate interest been identified in support of applying that law in the way done by the state courts to expressive activity like the parade. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87, and *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13, distinguished. Pp. 572–581.

418 Mass. 238, 636 N. E. 2d 1293, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Chester Darling argued the cause for petitioners. With him on the briefs were *Dwight G. Duncan* and *William M. Connolly*.

John Ward argued the cause for respondents. With him on the brief were *David Duncan, Gretchen Van Ness, Gary Buseck, Mary Bonauto, Larry W. Yackle,* and *Charles S. Sims.*[*]

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.

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[*] Briefs of *amici curiae* urging reversal were filed for the Boy Scouts of America by *George A. Davidson, Carla A. Kerr,* and *David K. Park;* for the Catholic War Veterans of the United States of America, Inc., by *John P. Hale;* for the Center for Individual Rights et al. by *Gary B. Born, Ernest L. Mathews, Jr., Maura R. Cahill,* and *Michael P. McDonald;* and for the Christian Legal Society et al. by *Steven T. McFarland, Samuel B. Casey,* and *Gregory S. Baylor.*

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League et al. by *Walter A. Smith, Jr., Thomas N. Bulleit, Jr., Steven M. Freeman, Arlene B. Mayerson, Antonia Hernandez, Alice E. Zaft, Judith L. Lichtman,* and *Donna R. Lenhoff;* and for the Irish Lesbian and Gay Organization et al. by *R. Paul Wickes* and *Michael E. Deutsch.*

Burt Neuborne, Steven R. Shapiro, and *Marjorie Heins* filed a brief for the American Civil Liberties Union as *amicus curiae.*

I

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. See J. Crimmins, St. Patrick's Day: Its Celebration in New York and other American Places, 1737–1845, pp. 15, 19 (1902); see generally 1 H. Commager & R. Morris, The Spirit of 'Seventy Six, pp. 138–183 (1958); The American Book of Days 262–265 (J. Hatch ed., 3d ed. 1978). Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, see Mass. Gen. Laws § 6:12K (1992), the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display. See Celebration of the Centennial Anniversary of the Evacuation of Boston by the British Army (G. Ellis ed. 1876); *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston et al.*, Civ. Action No. 92–1518A (Super. Ct., Mass., Dec. 15, 1993), reprinted in App. to Pet. for Cert. B1, B8–B9.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day-Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. No other applicant has ever applied for that permit. *Id.*, at B9. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. *Id.*, at B3; App. 51. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators. App. to Pet. for Cert. B3, and n. 4.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws § 272:98 (1992). After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," App. to Pet. for Cert. B5–B6, the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass. Gen. Laws § 272:92A (1992). The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." App. to Pet. for Cert. B8–B9. The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." *Id.*, at B6. It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. *Id.*, at B24. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group), *id.*, at B7, it attributed little significance to these facts, concluding ultimately that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade," *id.*, at B24.

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," *id.*, at B3, and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, *i. e.*, its members' sexual orientation," *id.*, at B4, n. 5, citing Tr. of Closing Arg. 43, 51–52 (Nov. 23, 1993). This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." App. to Pet. for

Cert. B24. The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "requir[e] focus on a specific message, theme, or group" absent from the parade. *Ibid.* "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." *Id.*, at B25. It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law." *Id.*, at B27.

The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only "incidental" and "no greater than necessary to accomplish the statute's legitimate purpose" of eradicating discrimination. *Id.*, at B25, citing *Roberts* v. *United States Jaycees*, 468 U. S. 609, 628–629 (1984). Accordingly, it ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants." App. to Pet. for Cert. B27.[1]

The Supreme Judicial Court of Massachusetts affirmed, seeing nothing clearly erroneous in the trial judge's findings that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation within the meaning of § 272:92A. *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *Boston*, 418 Mass. 238, 242–248, 636 N. E. 2d 1293, 1295–1298 (1994).[2] Turning to petitioners' First Amendment claim that application of the public accommodations law to the parade violated their freedom of speech (as distinguished from their right to expressive association, raised in the trial court), the court's majority held that it need not decide on the particular First Amendment theory involved "because, as the [trial] judge found, it is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" *Id.*, at 249, 636 N. E. 2d, at 1299 (footnote omitted). The defendants had thus failed at the trial level "to demonstrate that the parade truly was an exercise of . . . First Amendment rights," *id.*, at 250, 636 N. E. 2d, at 1299, citing *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293, n. 5 (1984), and on appeal nothing indicated to the majority of the Supreme Judicial Court that the trial judge's assessment of the evidence on this point was clearly erroneous, 418 Mass., at 250, 636 N. E. 2d, at 1299. The court rejected petitioners' further challenge to the law as overbroad, holding that it does not, on its face, regulate speech, does not let public officials examine the content of speech, and would not be interpreted as reaching speech. *Id.*, at 251–252, 636 N. E. 2d, at 1300. Finally, the court rejected the challenge that the public accommodations law was unconstitutionally vague, holding that this case did not present an issue of speech and that the law gave persons of ordinary intelligence a reasonable opportunity to know what was prohibited. *Id.*, at 252, 636 N. E. 2d, at 1300–1301.

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[1] The court dismissed the public accommodations law claim against the city because it found that the city's actions did not amount to inciting or assisting in the Council's violations of § 272:98. App. to Pet. for Cert. B12–B13. It also dismissed respondents' First and Fourteenth Amendment challenge against the Council for want of state action triggering the proscriptions of those Amendments. *Id.*, at B14–B22. Finally, the court did not reach the state constitutional questions, since respondents had apparently assumed in their arguments that those claims, too, depended for their success upon a finding of state action and because of the court's holding that the public accommodation statutes apply to the parade. *Id.*, at B22.

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[2] Since respondents did not cross-appeal the dismissal of their claims against the city, the Supreme Judicial Court declined to reach those claims. 418 Mass., at 245, n. 12, 636 N. E. 2d, at 1297.

Justice Nolan dissented. In his view, the Council "does not need a narrow or distinct theme or message in its parade for it to be protected under the First Amendment." *Id.*, at 256, 636 N. E. 2d, at 1303. First, he wrote, even if the parade had no message at all, GLIB's particular message could not be forced upon it. *Id.*, at 257, 636 N. E. 2d, at 1303, citing *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977) (state requirement to display "Live Free or Die" on license plates violates First Amendment). Second, according to Justice Nolan, the trial judge clearly erred in finding the parade devoid of expressive purpose. 418 Mass., at 257, 636 N. E. 2d, at 1303. He would have held that the Council, like any expressive association, cannot be barred from excluding applicants who do not share the views the Council wishes to advance. *Id.*, at 257–259, 636 N. E. 2d, at 1303–1304, citing *Roberts, supra.* Under either a pure speech or associational theory, the State's purpose of eliminating discrimination on the basis of sexual orientation, according to the dissent, could be achieved by more narrowly drawn means, such as ordering admission of individuals regardless of sexual preference, without taking the further step of prohibiting the Council from editing the views expressed in their parade. 418 Mass., at 256, 258, 636 N. E. 2d, at 1302, 1304. In Justice Nolan's opinion, because GLIB's message was separable from the status of its members, such a narrower order would accommodate the State's interest without the likelihood of infringing on the Council's First Amendment rights. Finally, he found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of "overwhelming evidence" that the Council objected to GLIB on account of its message and a dearth of testimony or documentation indicating that sexual orientation was the bar to admission. *Id.*, at 260, 636

N. E. 2d, at 1304. The dissent accordingly concluded that the Council had not even violated the State's public accommodations law.

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. 513 U. S. 1071 (1995). We hold that it does and reverse.

II

Given the scope of the issues as originally joined in this case, it is worth noting some that have fallen aside in the course of the litigation, before reaching us. Although the Council presents us with a First Amendment claim, respondents do not. Neither do they press a claim that the Council's action has denied them equal protection of the laws in violation of the Fourteenth Amendment. While the guarantees of free speech and equal protection guard only against encroachment by the government and "erec[t] no shield against merely private conduct," *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see *Hudgens* v. *NLRB*, 424 U. S. 507, 513 (1976), respondents originally argued that the Council's conduct was not purely private, but had the character of state action. The trial court's review of the city's involvement led it to find otherwise, however, and although the Supreme Judicial Court did not squarely address the issue, it appears to have affirmed the trial court's decision on that point as well as the others. In any event, respondents have not brought that question up either in a cross-petition for certiorari or in their briefs filed in this Court. When asked at oral argument whether they challenged the conclusion by the Massachusetts' courts that no state action is involved in the parade, respondents' counsel answered that they "do not press that issue here." Tr. of Oral Arg. 22. In this Court, then, their claim for inclusion in the parade rests solely on the Massachusetts public accommodations law.

There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984). The "requirement of independent appellate review . . . is a rule of federal constitutional law," *id.*, at 510, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 688 (1989), but which generally requires us to "review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske* v. *Kansas*, 274 U. S. 380, 385–386 (1927). See also *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Jacobellis* v. *Ohio*, 378 U. S. 184, 189 (1964) (opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp.*, *supra*, at 503. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that "[f]indings of fact . . . shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct, our obligation is to " 'make an independent examination of the whole record,' . . . so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285 (1964) (footnote omitted), quoting *Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963).

III

A

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." *Id.,* at 171. Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory* v. *Chicago,* 394 U. S. 111, 112 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards* v. *South Carolina, supra,* at 235, where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities "reflect an exercise of these basic constitutional rights in their most pristine and classic form." Accord, *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 152 (1969).

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 632 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, at 632, 642, wearing an armband to protest a war, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969), displaying a red flag, *Stromberg* v. *California,* 283 U. S. 359, 369 (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America* v. *Skokie,* 432 U. S. 43 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence* v. *Washington,* 418 U. S. 405, 411 (1974) *(per curiam),* would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (*e. g.*, "England get out of Ireland," "Say no to drugs"); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television. See Record, Exh. 84 (video). To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"). For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 258 (1974), as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times*, 376 U. S., at 265–266. The selection of contingents to make a parade is entitled to similar protection.

Respondents' participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. App. to Pet. for Cert. B3. The organization distributed a fact sheet describing the members' intentions, App. A51, and the record otherwise corroborates the expressive nature of GLIB's participation, see Record, Exh. 84 (video); App. A67 (photograph). In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

B

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. *Lane* v. *Cotton,* 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K. B. 1701) (Holt, C. J.); see *Bell* v. *Maryland,* 378 U. S. 226, 298, n. 17 (1964) (Goldberg, J., concurring); *Lombard* v. *Louisiana,* 373 U. S. 267, 277 (1963) (Douglas, J., concurring). As one of the 19th-century English judges put it, the rule was that "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." *Rex* v. *Ivens,* 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N. P. 1835); M. Konvitz & T. Leskes, A Century of Civil Rights 160 (1961).

After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. See Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865); Konvitz & Leskes, *supra,* at 155–156; Lerman & Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N. Y. U. Rev. L. & Soc. Change 215, 238 (1978); Fox, Discrimination and Antidiscrimination in Massachusetts Law, 44 B. U. L. Rev. 30, 58 (1964). In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," 1865 Mass. Acts, ch. 277, § 1, the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement, Lerman & Sanderson, *supra,* at 248. As with many public accommodations statutes across the Nation, the legislature continued to broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws § 272:98 (1992). Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. See, *e. g., New York State Club Assn., Inc.* v. *City of New York,* 487 U. S. 1, 11–16 (1988); *Roberts* v. *United States Jaycees,* 468 U. S., at 624–626; *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 258–262 (1964). Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

C

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. See App. to Pet. for Cert. B26–B27, and n. 28. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, see, *e. g.*, 418 Mass., at 247–248, 636 N. E. 2d, at 1297–1298, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

"Since *all* speech inherently involves choices of what to say and what to leave unsaid," *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U. S. 1, 11 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say," *id.*, at 16. Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 386–387 (1973), outside that context it may not compel affirmance of a belief with which the speaker disagrees, see *Barnette*, 319 U. S., at 642. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 341–342 (1995); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 797–798 (1988), subject, perhaps, to the permissive law of defamation, *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 347–349 (1974); *Hustler Magazine, Inc.* v. *Falwell,* 485 U. S. 46 (1988). Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. See *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access for expressive purposes, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. *Id.*, at 662. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." Brief for Respondents 21. But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, "is more than a passive receptacle or conduit for news, comment, and advertising," and we have held that "[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . .—whether fair or unfair—constitute the exercise of editorial control and judgment" upon which the State can not intrude. *Tornillo*, 418 U. S., at 258. Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." 475 U. S., at 15 (plurality opinion) (citation omitted). The plurality made the further point that if "the government

[were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.*, at 16. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

In *Turner Broadcasting,* we found this problem absent in the cable context, because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U. S., at 655. We stressed that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility." *Ibid.* (citation omitted); see *id.*, at 684 (O'CONNOR, J., concurring in part and dissenting in part) (noting that Congress "might . . . conceivably obligate cable operators to act as common carriers for some of their channels").

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. Cf. *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 87 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"). Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

An additional distinction between *Turner Broadcasting* and this case points to the fundamental weakness of any attempt to justify the state-court order's limitation on the Council's autonomy as a speaker. A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government's interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers. In thus identifying an interest going beyond abridgment of speech itself, the defenders of the law at issue in *Turner Broadcasting* addressed the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny, that a challenged restriction on speech serve a compelling, or at least important, governmental object, see, *e. g., Pacific Gas & Electric, supra,* at 19; *Turner Broadcasting, supra,* at 662; *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968).

In this case, of course, there is no assertion comparable to the *Turner Broadcasting* claim that some speakers will be destroyed in the absence of the challenged law. True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators. See App. to Pet. for Cert. B9; Brief for Respondents 10 (citing trial court's finding that no other applicant has applied for the permit). Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to "silence the voice of competing speakers," as cable operators do with respect to program providers who wish to reach subscribers, *Turner Broadcasting, supra,* at 656. Nor has any other legitimate interest been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.

The statute, Mass. Gen. Laws § 272:98 (1992), is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. See, *e. g., Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972); cf. H. Kalven, A Worthy Tradition 6–19 (1988); Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1408–1409 (1986). The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. See, *e. g., Barnette*, 319 U. S., at 642; *Pacific Gas & Electric*, 475 U. S., at 20. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Far from supporting GLIB, then, *Turner Broadcasting* points to the reasons why the present application of the Massachusetts law can not be sustained. So do the two other principal authorities GLIB has cited. In *PruneYard Shopping Center* v. *Robins, supra*, to be sure, we sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions without a showing that the shopping mall owners would otherwise prevent the beneficiaries of the law from reaching an audience. But we found in that case that the proprietors were running "a business establishment that is open to the public to come and go as they please," that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." 447 U. S., at 87. Also, in *Pacific Gas & Electric*, *supra*, at 12, we noted that *PruneYard* did not involve "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets . . . ." The principle of speaker's autonomy was simply not threatened in that case.

New York State Club Assn. is also instructive by the contrast it provides. There, we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships. 487 U. S., at 13; see also *Roberts*, 468 U. S., at 627. In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization's message itself. If we were to analyze this case strictly along those lines, GLIB would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

IV

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

NATIONAL PRIVATE TRUCK COUNCIL, INC., ET AL. *v.* OKLAHOMA TAX COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

No. 94–688. Argued April 18, 1995—Decided June 19, 1995

In the Oklahoma state courts, petitioners successfully challenged certain state taxes as violating the "dormant" Commerce Clause. The Oklahoma Supreme Court ordered respondents to award refunds pursuant to state law, but declined to award declaratory or injunctive relief under 42 U. S. C. § 1983 or attorney's fees under § 1988. The court reasoned that because adequate remedies existed under state law, the Tax Injunction Act would have precluded petitioners from seeking an injunction in federal court; although that Act does not apply to state courts, the Oklahoma Supreme Court invoked the principle of "intrastate uniformity" to conclude that petitioners were not entitled to injunctive or declaratory relief under § 1983.

Held:

1. Section 1983 provides no basis for courts to issue injunctive or declaratory relief in state tax cases when there is an adequate remedy at law. This Court has long held that courts should adopt a hands-off approach with respect to state tax administration. *Dows* v. *Chicago*, 11 Wall. 108, 110. In passing § 1983, Congress did not limit this strong background principle of noninterference with state taxation. Construing § 1983 with this principle in mind, the Court concludes that § 1983 does not call for courts—whether federal or state—to disrupt state tax administration by issuing injunctive or declaratory relief when state law furnishes an adequate legal remedy. Pp. 588–592.

2. Since no relief could be awarded under § 1983, no attorney's fees can be awarded under § 1988. P. 592.

879 P. 2d 137, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 592.

Richard A. Allen argued the cause for petitioners. With him on the briefs was *Richard P. Schweitzer*.

Stanley P. Johnston argued the cause for respondents. With him on the brief was *Robert B. Struble*.*

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*Briefs of *amici curiae* urging reversal were filed for the Direct Marketing Association, Inc., by *George S. Isaacson*, *Martin I. Eisenstein*, and

JUSTICE THOMAS delivered the opinion of the Court.

In the Oklahoma state courts, petitioners successfully challenged certain Oklahoma taxes as violating the "dormant" Commerce Clause. Although the Oklahoma Supreme Court ordered respondents to award refunds pursuant to

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Robert J. Levering; for the National Retail Federation by *Timothy B. Dyk, Maryann B. Gall,* and *Jeffrey S. Sutton;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *Deborah T. Poritz,* Attorney General of New Jersey, *Joseph L. Yannotti,* Assistant Attorney General, *Rachel J. Horowitz,* Deputy Attorney General, *Jeff Sessions,* Attorney General of Alabama, *Grant Woods,* Attorney General of Arizona, *Winston Bryant,* Attorney General of Arkansas, *Daniel E. Lungren,* Attorney General of California, *Richard Blumenthal,* Attorney General of Connecticut, *M. Jane Brady,* Attorney General of Delaware, *Garland Pinkston, Jr.,* Acting Corporation Counsel of the District of Columbia, *Robert A. Butterworth,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Margery S. Bronster,* Attorney General of Hawaii, *Alan G. Lance,* Attorney General of Idaho, *Jim Ryan,* Attorney General of Illinois, *Pamela Fanning Carter,* Attorney General of Indiana, *Carla J. Stovall,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Andrew Ketterer,* Attorney General of Maine, *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Scott Harshbarger,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *Joseph P. Mazurek,* Attorney General of Montana, *Don Stenberg,* Attorney General of Nebraska, *Frankie Sue Del Papa,* Attorney General of Nevada, *Jeffrey R. Howard,* Attorney General of New Hampshire, *Tom Udall,* Attorney General of New Mexico, *Michael F. Easley,* Attorney General of North Carolina, *Heidi Heitkamp,* Attorney General of North Dakota, *Betty D. Montgomery,* Attorney General of Ohio, *Theodore R. Kulongoski,* Attorney General of Oregon, *Ernest D. Preate, Jr.,* Attorney General of Pennsylvania, *Pedro R. Pierluisi,* Attorney General of Puerto Rico, *Jeffrey B. Pine,* Attorney General of Rhode Island, *Charles W. Burson,* Attorney General of Tennessee, *Dan Morales,* Attorney General of Texas, *Jan Graham,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *James S. Gilmore III,* Attorney General of Virginia, *Christine O. Gregoire,* Attorney General of Washington, *James E. Doyle,* Attorney General of Wisconsin, and *Eleni M. Constantine;* for the Boyertown Area School District et al. by *Howard J. Bashman;* and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley.*

state law, it also held that petitioners were not entitled to declaratory or injunctive relief under Rev. Stat. § 1979, 42 U. S. C. § 1983, and, accordingly, that they could not obtain attorney's fees under 42 U. S. C. § 1988(b) (1988 ed., Supp. V). Petitioners argue that this holding violates the Supremacy Clause, U. S. Const., Art. VI, cl. 2. We affirm.

I

In 1983, Oklahoma imposed third-structure taxes against motor carriers with vehicles registered in any of 25 States.[1] It did so in order to retaliate against those States that had imposed discriminatory taxes against trucks registered in Oklahoma. In December 1984, petitioners filed a class action in an Oklahoma trial court, arguing that the taxes violated the dormant Commerce Clause and the Privileges and Immunities Clause of Art. IV, § 2, cl. 1. Pursuant to state law and § 1983, petitioners sought declaratory and injunctive relief as well as refunds of taxes paid. In addition, they sought attorney's fees under both state law and § 1988.[2]

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[1] Third-structure taxes are those nonregistration, nonfuel taxes that are neither apportioned nor prorated. One example of a third-structure tax is an axle tax, which imposes a flat charge based on the number of axles per vehicle. See *Private Truck Council* v. *Oklahoma Tax Comm'n*, 806 P. 2d 598, 600–601 (Okla. 1990).

[2] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1988(b) provides:

"In any action or proceeding to enforce a provision of sectio[n] . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing

The trial court upheld the constitutionality of the taxes, but the Oklahoma Supreme Court reversed and held that the taxes were invalid under our dormant Commerce Clause jurisprudence. *Private Truck Council* v. *Oklahoma Tax Comm'n*, 806 P. 2d 598 (1990). The court awarded refunds under state law, but declined to award relief under § 1983 and declined to award attorney's fees under § 1988. In so ruling, it relied on *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139 (CA8), cert. denied, 469 U. S. 834 (1984), which held that § 1983 may not be used to secure remedies for dormant Commerce Clause violations.

After the Oklahoma Supreme Court's decision, we held that one of the "rights, privileges or immunities" protected by § 1983 was the right to be free from state action that violates the dormant Commerce Clause. See *Dennis* v. *Higgins*, 498 U. S. 439 (1991). Accordingly, we granted the taxpayers' petition for certiorari, vacated the judgment, and remanded the case for further consideration in light of *Dennis*. 501 U. S. 1247 (1991).

On remand, the Oklahoma Supreme Court once again held that petitioners were not entitled to relief under § 1983. 879 P. 2d 137 (1994). The court noted that because adequate remedies existed under state law, the Tax Injunction Act, 28 U. S. C. § 1341, would have precluded petitioners from seeking an injunction in federal court. 879 P. 2d, at 140–141. Although the Tax Injunction Act does not apply in state courts, the Oklahoma Supreme Court relied upon the principle of "intrastate uniformity" to conclude that a state court need not grant injunctive or declaratory relief under § 1983 when such remedies would not be available in federal court. *Id.*, at 141 (quoting *Felder* v. *Casey*, 487 U. S. 131, 153 (1988)). We granted certiorari to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide

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party . . . a reasonable attorney's fee as part of the costs." 42 U. S. C. § 1988(b) (1988 ed., Supp. V).

relief under § 1983 when adequate remedies exist under state law.[3]

II

We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. Immediately prior to the enactment of § 1983, the Court articulated the reasons behind the reluctance to interfere:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871).

Since the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion. See 28 U. S. C. § 1341 (prohibiting federal courts from enjoining the collection of any state tax "where a plain, speedy and efficient remedy may be had in the courts of such State"). We subsequently relied upon the Act's spirit to extend the prohibition from injunctions to declaratory judgments regarding the constitutionality of state taxes. See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943). Later, we held that the Tax Injunction Act itself precluded district courts from awarding such declaratory judgments. See *Cal-*

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[3] Compare *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 490 A. 2d 509 (1985) (States need not provide § 1983 remedy in state tax cases) and *Backus* v. *Chilivis*, 236 Ga. 500, 224 S. E. 2d 370 (1976) (same), with *Murtagh* v. *County of Berks*, 535 Pa. 50, 634 A. 2d 179 (1993) (States must provide § 1983 remedy in state tax cases), cert. denied, 511 U. S. 1017 (1994), and *Harlan Sprague Dawley, Inc.* v. *Indiana Dept. of State Revenue*, 583 N. E. 2d 214 (Ind. Tax 1991) (same).

ifornia v. *Grace Brethren Church,* 457 U. S. 393, 407–411 (1982).

The reluctance to interfere with state tax collection continued in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U. S. 18 (1990), in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a " 'clear and certain remedy,' " *id.,* at 51 (quoting *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280, 285 (1912)), the States may determine whether to provide predeprivation process (*e. g.,* an injunction) or instead to afford postdeprivation relief (*e. g.,* a refund), 496 U. S., at 36–37. See also *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86, 100–102 (1993). Of particular relevance to this case, *Fair Assessment in Real Estate Assn., Inc.* v. *McNary,* 454 U. S. 100, 116 (1981), held that because of principles of comity and federalism, Congress never authorized federal courts to entertain damages actions under § 1983 against state taxes when state law furnishes an adequate legal remedy.

Seeking to overcome the longstanding federal reluctance to interfere with state taxation, petitioners invoke the Supremacy Clause and the straightforward proposition that it requires state courts to enforce federal law, here §§ 1983 and 1988. When they have jurisdiction, state courts have been compelled to provide federal remedies, notwithstanding the existence of less intrusive state-law remedies. See, *e. g., Monroe* v. *Pape,* 365 U. S. 167, 183 (1961). Accordingly, petitioners argue that we should require the Oklahoma Supreme Court to award equitable and declaratory relief under § 1983 and attorney's fees under § 1988.

For purposes of this case, we will assume without deciding that state courts generally must hear § 1983 suits.[4] But this does not necessarily mean that, having found a violation of federal law, state courts must award declaratory and injunctive relief under § 1983 in tax cases. Though federal courts are obliged to hear § 1983 claims, it is clear that they may not award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists. See *Fair Assessment, supra,* at 116; *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* at 293; *Matthews* v. *Rodgers,* 284 U. S. 521, 525 (1932); 28 U. S. C. § 1341.

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[4] We have never held that state courts must entertain § 1983 suits. See *Martinez* v. *California,* 444 U. S. 277, 283, n. 7 (1980) ("We have never considered . . . the question whether a State *must* entertain a claim under

As we explain more fully below, the background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law.[5]

III

Petitioners correctly point out that the Tax Injunction Act does not prohibit state courts from entertaining § 1983 suits that seek to enjoin the collection of state taxes. Nor can a desire for "intrastate uniformity" permit state courts to refuse to award relief merely because a federal court could not grant such relief. As petitioners note, it was not until 1875 that Congress provided any kind of general federal-question jurisdiction to the lower federal courts. See *Palmore* v. *United States,* 411 U. S. 389, 401 (1973). "Until that time, the state courts provided the only forum for vindicating many important federal claims." *Ibid.* Because of the Supremacy Clause, state courts could not have refused to hear cases arising under federal law merely to ensure "uniformity" between state and federal courts located within a particular state.

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§ 1983"). Cf. *Arkansas Writers' Project, Inc.* v. *Ragland,* 481 U. S. 221, 234, n. 7 (1987) (observing that whether state courts must assume jurisdiction over § 1983 claims involving state taxes "is not entirely clear").

[5] *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 68–69 (1989), already established that petitioners' claim for refunds against the State could not proceed under § 1983.

In determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists. Petitioners do not dispute that Oklahoma has offered an adequate remedy in the form of refunds. Under these circumstances, the Oklahoma courts' denial of relief under § 1983 was consistent with the long line of precedent underscoring the federal reluctance to interfere with state taxation.

Our cases since *Dows* have uniformly concluded that federal courts cannot enjoin the collection of state taxes when a remedy at law is available. See, *e. g., Matthews* v. *Rodgers, supra,* at 525 (a "scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere by injunction with their fiscal operations, require that [injunctive] relief should be denied in every case where the asserted federal right may be preserved without it"); *Singer Sewing Machine Co. of N. J.* v. *Benedict,* 229 U. S. 481, 485 (1913); *Boise Artesian Hot & Cold Water Co.* v. *Boise City,* 213 U. S. 276, 282 (1909). Until *Fair Assessment,* one could have construed these cases as concerning only the equitable powers of the federal courts. See 454 U. S., at 108–111. In *Fair Assessment,* however, the principle of noninterference with state taxation led us to construe § 1983 narrowly. We held that § 1983 does not permit federal courts to award damages in state tax cases when state law provides an adequate remedy. See *id.,* at 116. Although there was much discussion of the limitations on equity power, that discussion was useful only insofar as it provided a background against which § 1983 must be interpreted. Indeed, because *Fair Assessment* considered whether damages were available under § 1983, the principle of equitable restraint that we discussed could have no direct application in that case.

In concluding that Congress did not authorize damages actions in state tax cases brought in federal court, we found no evidence that Congress intended § 1983 to overturn the principle of federalism invoked in *Dows* and subsequently followed by the courts. Construing § 1983, we held that the case was "controlled by principles articulated even before enactment of § 1983 and followed in later decisions." *Id.*, at 115–116.

Just as *Fair Assessment* relied upon a background principle in interpreting § 1983 to preclude damages actions in tax cases brought in federal court, so we rely on the same principle in interpreting § 1983 to provide no basis for courts to award injunctive relief when an adequate legal remedy exists. Our interpretation is supported not only by the background principle of federal noninterference discussed in *Fair Assessment*, but also by the principles of equitable restraint discussed at length in that case. See *id.*, at 107–109. Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way.

To be sure, the Tax Injunction Act reflects the congressional concern with *federal* court interference with state taxation, see 28 U. S. C. § 1341, and there is no similar statute divesting state courts of the authority to enter an injunction under federal law when an adequate legal remedy exists. But this silence is irrelevant here, because we do not understand § 1983 to call for courts (whether federal or state) to enjoin the collection of state taxes when an adequate remedy is available under state law. Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation. See *Fair Assessment*, *supra*, at 110 ("[T]he principle of comity which predated the Act [§ 1341] was not restricted by its passage"). After all, an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court.

The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well. In *Great Lakes*, we observed that "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes . . . require a like restraint in the use of the declaratory judgment procedure." 319 U. S., at 299. The declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *ibid.*, and thus must be treated as being no less potentially disruptive than an injunction. See also *Grace Brethren Church*, 457 U. S., at 408 ("[T]here is little practical difference between injunctive and declaratory relief"). Cf. *Samuels* v. *Mackell*, 401 U. S. 66 (1971) (holding that prohibition against enjoining pending state criminal proceedings applies to granting of declaratory relief). Declaratory relief in state tax cases might throw tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part). We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.[6]

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[6] As our opinions reveal, there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists. For example, if the "enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, [or] throw a cloud upon the title," equity might be invoked. *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871). As we have made clear, however, the multiplicity-of-suits rationale for permitting equitable relief extends only to those situations where there is a real risk of "numerous suits between the same parties, involving the same issues of law or fact." *Matthews* v. *Rodgers*, 284 U. S. 521, 530 (1932). Thus, if a state court awards a refund to a taxpayer on

Of course, nothing we say prevents a State from empowering its own courts to issue injunctions and declaratory judgments even when a legal remedy exists. Absent a valid federal prohibition, state courts are free to issue injunctions and declaratory judgments under *state* law. When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, however, state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.

Because petitioners had an adequate legal remedy, the Oklahoma courts could not have awarded either declaratory or injunctive relief against the state taxes under § 1983. It follows that when no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988. Accordingly, the judgment of the Oklahoma Supreme Court is

Affirmed.

JUSTICE KENNEDY, concurring.

One reason for difficulty in adapting 42 U. S. C. § 1983 to an action attacking a state tax is, in my view, that § 1983 was not intended for claims based on the Commerce Clause at all. See *Dennis* v. *Higgins*, 498 U. S. 439, 451 (1991) (KENNEDY, J., dissenting) (violations of the Commerce Clause do not give rise to a cause of action under § 1983); see also *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 117 (1989) (KENNEDY, J., dissenting) (a federal statute's pre-emptive effect does not secure a right within the meaning of § 1983). The Court has not adopted that position, however, and on that premise I agree with today's opinion and join it in full.

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the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the unconstitutional tax, injunctive and declaratory relief might then be appropriate. In such circumstances, the remedy might be thought to be "inadequate."

UNITED STATES *v.* AGUILAR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–270. Argued March 20, 1995—Decided June 21, 1995

Respondent Aguilar, a United States District Judge, was convicted of illegally disclosing a wiretap in violation of 18 U. S. C. § 2232(c), even though the authorization for the particular wiretap had expired before the disclosure was made. Because he lied to Federal Bureau of Investigation (FBI) agents during a grand jury investigation, he also was convicted of endeavoring to obstruct the due administration of justice under § 1503. The Court of Appeals reversed both convictions, reasoning that Aguilar's conduct in each instance was not covered by the statutory language.

Held:

1. Uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient to make out a violation of § 1503's prohibition of "endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice." The "nexus" requirement developed in recent Courts of Appeals decisions—whereby the accused's act must have a relationship in time, causation, or logic with grand jury or judicial proceedings—is a correct construction of § 1503's very broad language. Under that approach, the accused must take action with an intent to influence such proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. Moreover, the endeavor must have the "natural and probable effect" of interfering with the due administration of justice, see, *e. g., United States* v. *Wood,* 6 F. 3d 692, 695, and a person lacking knowledge that his actions are likely to affect a pending proceeding necessarily lacks the requisite intent to obstruct, *Pettibone* v. *United States,* 148 U. S. 197, 206–207. The Government did not show here that the FBI agents acted as an arm of the grand jury, that the grand jury had subpoenaed their testimony or otherwise directed them to appear, or that respondent knew that his false statements would be provided to the grand jury. Indeed, the evidence goes no further than showing that respondent testified falsely to an investigating agent. What use will be made of such testimony is so speculative that the testimony cannot be said to have the "natural and probable effect" of obstructing justice. Pp. 598–602.

2. Disclosure of a wiretap after its authorization expires violates §2232(c), which provides criminal penalties for anyone who, "[1] having knowledge that a Federal . . . officer has been authorized or has applied for authorization . . . to intercept a wire . . . communication, [2] in order to obstruct, impede, or prevent such interception, [3] gives notice or attempts to give notice of the possible interception to any person." Contrary to the Court of Appeals' holding, the statutory language does not require that the wiretap application or authorization be pending or *in esse* at the time of the disclosure. Such a narrow purpose is not evidenced by the term "such interception" in the statute's second clause, which merely establishes that the defendant must intend to obstruct the interception made pursuant to the application or authorization of which he has the knowledge required by the first clause. Similarly, the phrase "possible interception" in the third clause was not designed to limit the punishable offense to cases where the interception was factually "possible," but was intended to recognize the fact that at the time the prohibited notice was given it very likely could not be known whether or not there would be an interception. Moreover, without the word "possible," the statute would only prohibit giving notice of "the interception": It would not reach the giving of notice of an application which has not yet resulted in an authorization or an authorization which has not yet resulted in an interception. Finally, the statute need not be read to exclude disclosures of expired wiretaps because of concern that a broader construction would run counter to the First Amendment. The Government's interest in nondisclosure by officials in sensitive confidential positions is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns. Pp. 602–606.

21 F. 3d 1475, affirmed in part, reversed in part, and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined, in Part I of which STEVENS, J., joined, and in all but Part I and the last paragraph of Part II of which SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 606. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 609.

James A. Feldman argued the cause for the United States. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Harris*, *Deputy Solicitor General Dreeben*, and *Patty Merkamp Stemler*.

Robert D. Luskin argued the cause for respondent. With him on the brief were *Joseph G. Davis* and *Paul B. Meltzer.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A jury convicted United States District Judge Robert Aguilar of one count of illegally disclosing a wiretap in violation of 18 U. S. C. §2232(c), and of one count of endeavoring to obstruct the due administration of justice in violation of §1503. A panel of the Court of Appeals for the Ninth Circuit affirmed the conviction under §2232(c) but reversed the conviction under §1503. After rehearing en banc, the Court of Appeals reversed both convictions. We granted certiorari to resolve a conflict among the Federal Circuits over whether §1503 punishes false statements made to potential grand jury witnesses, and to answer the important question whether disclosure of a wiretap after its authorization expires violates §2232(c). 513 U. S. 1013 (1994).

Many facts remain disputed by the parties. Both parties appear to agree, however, that a motion for postconviction relief filed by one Michael Rudy Tham represents the starting point from which events bearing on this case unfolded. Tham was an officer of the International Brotherhood of Teamsters, and was convicted of embezzling funds from the local affiliate of that organization. In July 1987, he filed a motion under 28 U. S. C. §2255 to have his conviction set aside. The motion was assigned to Judge Stanley Weigel. Tham, seeking to enhance the odds that his petition would be granted, asked Edward Solomon and Abraham Chalupowitz, a.k.a. Abe Chapman, to assist him by capitalizing on their respective acquaintances with another judge in the Northern District of California, respondent Aguilar. Respondent knew Chapman as a distant relation by marriage and knew Solomon from law school. Solomon and Chapman met with respondent to discuss Tham's case, as a result of which respondent spoke with Judge Weigel about the matter.

**Gerald B. Lefcourt* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Independent of the embezzlement conviction, the Federal Bureau of Investigation (FBI) identified Tham as a suspect in an investigation of labor racketeering. On April 20, 1987, the FBI applied for authorization to install a wiretap on Tham's business phones. Chapman appeared on the application as a potential interceptee. Chief District Judge Robert Peckham authorized the wiretap. The 30-day wiretap expired by law on May 20, 1987, 18 U. S. C. § 2518(5), but Chief Judge Peckham maintained the secrecy of the wiretap under § 2518(8)(d) after a showing of good cause. During the course of the racketeering investigation, the FBI learned of the meetings between Chapman and respondent. The FBI informed Chief Judge Peckham, who, concerned with appearances of impropriety, advised respondent in August 1987 that Chapman might be connected with criminal elements because Chapman's name had appeared on a wiretap authorization.

Five months after respondent learned that Chapman had been named in a wiretap authorization, he noticed a man observing his home during a visit by Chapman. He alerted his nephew to this fact and conveyed the message (with an intent that his nephew relay the information to Chapman) that Chapman's phone was being wiretapped. Respondent apparently believed, in error, both that Chapman's phones were tapped in connection with the initial application and that the initial authorization was still in effect. Chief Judge Peckham had in fact authorized another wiretap on Tham's phones effective from October 1987 through the period in which respondent made the disclosure, but there is no suggestion in the record that the latter had any specific knowledge of this reauthorization.

At this point, respondent's involvement in the two separate Tham matters converged. Two months after the disclosure to his nephew, a grand jury began to investigate an alleged conspiracy to influence the outcome of Tham's habeas case. Two FBI agents questioned respondent. During the interview, respondent lied about his participation in the Tham case and his knowledge of the wiretap. The grand jury returned an indictment; a jury convicted Aguilar of one count of disclosing a wiretap, 18 U. S. C. § 2232(c), and one count of endeavoring to obstruct the due administration of justice, § 1503. A panel of the Court of Appeals for the Ninth Circuit affirmed the § 2232(c) conviction but reversed the § 1503 conviction.

On rehearing en banc, the Court of Appeals reversed both convictions for the reason that the conduct in each instance was not covered by the statutory language. 21 F. 3d 1475 (1994). The court concluded that § 2232(c) requires the disclosure of a pending wiretap application or an authorization that had not expired because the purpose of the statute was to thwart interference with the " 'possible interception' " of the wiretap of which the defendant had knowledge. *Id.*, at 1480. Finding the interception in this case impossible once the authorization had expired, it held respondent's disclosure was not covered by the plain language of the statute. The Court of Appeals also found that respondent had not interfered with a pending judicial proceeding under § 1503. It first noted that the grand jury had not authorized or directed the FBI investigation. It then held that merely uttering false statements does not " 'corruptly influence' " within the meaning of the statute. *Id.*, at 1485–1486. It drew this conclusion, in part, from 1988 amendments to § 1512, which added a prohibition on corrupt persuasion of witnesses. The court read the corrupt persuasion prohibited by § 1512 to require an active attempt to persuade a witness to tell a false story, and used the language in § 1512 as a guide to interpret the omnibus clause of § 1503 narrowly.

I

Section 1503 provides:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or *corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1503 (emphasis added).

The statute is structured as follows: first it proscribes persons from endeavoring to influence, intimidate, or impede grand or petit jurors or court officers in the discharge of their duties; it then prohibits injuring grand or petit jurors in their person or property because of any verdict or indictment rendered by them; it then prohibits injury of any court officer, commissioner, or similar officer on account of the performance of his official duties; finally, the "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute. Respondent was charged with a violation of the Omnibus Clause, to wit: with "corruptly endeavor[ing] to influence, obstruct, and impede the . . . grand jury investigation." App. 106.

The first case from this Court construing the predecessor statute to § 1503 was *Pettibone* v. *United States*, 148 U. S. 197 (1893). There we held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.*, at 206. The Court reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct. *Id.*, at 207. Recent decisions of Courts of Appeals have likewise tended to place metes and bounds on the very broad language of the catchall provision. The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. *United States* v. *Brown*, 688 F. 2d 596, 598 (CA9 1982) (citing cases). Some courts have phrased this showing as a "nexus" requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. *United States* v. *Wood*, 6 F. 3d 692, 696 (CA10 1993); *United States* v. *Walasek*, 527 F. 2d 676, 679, and n. 12 (CA3 1975). In other words, the endeavor must have the " 'natural and probable effect' " of interfering with the due administration of justice. *Wood*, *supra*, at 695; *United States* v. *Thomas*, 916 F. 2d 647, 651 (CA11 1990); *Walasek*, *supra*, at 679. This is not to say that the defendant's actions need be successful; an "endeavor" suffices. *United States* v. *Russell*, 255 U. S. 138, 143 (1921). But as in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.

Although respondent urges various broader grounds for affirmance,[1] we find it unnecessary to address them because we think the "nexus" requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503. We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling* v. *United States,* 473 U. S. 207 (1985), and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed," *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931). We do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catch-all provision of § 1503.

The Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents. The Government argues that respondent "understood that his false statements would be provided to the grand jury" and that he made the statements with the intent to thwart the grand jury investigation and not just the FBI investigation. Brief for United States 18. The Government supports its argument with a citation to the transcript of the recorded conversation between Aguilar and the FBI agent at the point where Aguilar asks whether he is a target of a grand jury investigation. The agent responded to the question by stating:

> "[T]here is a Grand Jury meeting. Convening I guess that's the correct word. Um some evidence will be heard I'm . . . I'm sure on this issue." App. 86.

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[1] Respondent argues that the term "corruptly" is vague and overbroad as applied to the type of conduct at issue in this case and that Congress narrowed the scope of the Omnibus Clause when it expressly punished his conduct in 18 U. S. C. § 1512.

Because respondent knew of the pending proceeding, the Government therefore contends that Aguilar's statements are analogous to those made directly to the grand jury itself, in the form of false testimony or false documents.[2]

We think the transcript citation relied upon by the Government would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. We think it cannot be said to have the "natural and probable effect" of interfering with the due administration of justice.

JUSTICE SCALIA criticizes our treatment of the statutory language for reading the word "endeavor" out of it, inasmuch as it excludes defendants who have an evil purpose but use means that would "only unnaturally and improbably be successful." *Post*, at 612. This criticism is unwarranted. Our reading of the statute gives the term "endeavor" a useful function to fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way. Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice. Under our approach, a jury could find such defendant guilty.

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[2] See, *e. g., United States* v. *Mullins*, 22 F. 3d 1365, 1367–1368 (CA6 1994) (altered records and instructed co-worker to alter records subject to subpoena *duces tecum*); *United States* v. *Williams*, 874 F. 2d 968, 976–982 (CA5 1989) (uttered false testimony to grand jury); *United States* v. *McComb*, 744 F. 2d 555, 559 (CA7 1984) (created false meeting minutes and voluntarily delivered them to grand jury); *United States* v. *Faudman*, 640 F. 2d 20, 23 (CA6 1981) (falsified records, some of which had been sought by subpoena *duces tecum*); *United States* v. *Walasek*, 527 F. 2d 676, 679–680 (CA3 1975) (falsified documents requested by subpoena *duces tecum*).

JUSTICE SCALIA also apparently believes that *any* act, done with the intent to "obstruct . . . the due administration of justice," is sufficient to impose criminal liability. Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability.

II

Section 2232(c) prohibits the disclosure of information that a wiretap has been sought or authorized. The statute reads:

> "Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both." 18 U. S. C. § 2232(c).

This section is much more precisely targeted than is the catchall provision of § 1503 discussed above. The first clause defines the element of knowledge required for the act to be criminal: knowledge that an officer has been authorized or has sought authorization to intercept a communication. The second clause defines the required intent with which the act be done: "in order to obstruct, impede, or prevent such interception." The third clause defines the punishable act: "gives notice or attempts to give notice of the possible interception." Respondent persuaded the Court of Appeals to hold that the wiretap application or authorization must be pending or *in esse* at the time of the disclosure, but we do not believe any such requirement is to be found in the statutory language.

Respondent here urges the reasoning accepted by the Court of Appeals. "[T]he purpose of the statute is to prevent interference with 'possible interception.'" 21 F. 3d, at 1480. Once a wiretap has expired or been denied, the Ninth Circuit reasoned, there is no "'possible interception'" to disclose or attempt to disclose. *Ibid.* The narrow purpose of the statute is further evidenced by the statute's intent requirement, which limits punishable disclosures to those undertaken with the intent to interfere with "'such interception'" of which the defendant "has knowledge." *Ibid.* Under the circumstances, the disclosure of an expired wiretap not only fails to violate the terms of the statute, it fails to implicate any interest protected by § 2232(c). Brief for Respondent 38.

But this argument, we think, fails in the face of the statutory language itself. The term "such interception" is part of the intent requirement in the second clause; the defendant must intend to obstruct the interception made pursuant to the application or authorization of which he has the knowledge required by the first clause. The phrase "possible interception" is found in the third clause, which describes the act which offends the statute. A defendant intending to disclose the existence of a pending application would ordinarily have no way of knowing whether the application or authorization had resulted in an interception, and that is doubtless why the third clause uses the term "possible" interception.

It was not intended to limit the offense to cases where the interception based upon the application or authorization was factually possible, but to recognize the fact that at the time the prohibited notice was given it very likely could not be known whether or not there would be an interception.

The Court of Appeals thought its result justified by its view that the aim of the statute was to prevent interference with "possible" interceptions, and that if an interception was not possible because the wiretap was no longer in place at the time of the disclosure, that interest was not threatened. But the statute is aimed at something more than the interference with interceptions; it is aimed at disclosure of wiretap orders or applications which may lead to interceptions. The offense is complete at the time the notice is given, when it often cannot be known whether any interception will take place.

JUSTICE STEVENS argues that § 2232(c) criminalizes disclosures of pending applications without a need to rely on the word " 'possible.' " *Post,* at 608. That is not so. The reference to pending applications occurs only in the clause specifying the knowledge element. The *actus reus* element must be independently satisfied. Without the word "possible," the statute would only prohibit giving notice of "the interception": It would not reach the giving of notice of an application which has not yet resulted in an authorization or an authorization which has not yet resulted in an interception. That Congress could have accomplished the same result by phrasing the statute differently—for instance, by repeating " 'such interception' " in the third clause, *ibid.*—does not undercut the fact that the word "possible" is necessary in the statute *as written* to criminalize such behavior.[3]

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[3] JUSTICE STEVENS also argues that our reading of the statute would achieve no temporal limitation on liability and could result in the "absurd" prosecution of a discloser 10 years after the wiretap expired. *Post,* at 608–609. Although we reserve the question for a case that presents it, we note that the wiretapping scheme as a whole suggests that a plausible

Acceptance of respondent's position would open the door to additional claims of "impossibility" other than the fact that the application or order was not pending at the time of the disclosure. Some sort of mechanical failure, or the departure of the person whose conversation was to be intercepted from the place at which the reception was authorized, are two which come to mind. In *Osborn* v. *United States*, 385 U. S. 323, 333 (1966), we expressed reservations about the "continuing validity [of] the doctrine of 'impossibility,' with all its subtleties," in the law of criminal attempt, and we would require much more than the statutory language before us to believe that Congress intended to engraft it onto the language of § 2232(c).

Finally, respondent urges us to read the statute to exclude disclosures of expired wiretaps because of concern that a broader construction would run counter to the First Amendment. We see no necessity for such a restrictive construction of the statute. It is true that the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a "state interest of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 103 (1979). But the statute here in question does not impose such a restriction generally, but only upon those who disclose wiretap information "in order to obstruct, impede, or prevent" the interception. Nor was the respondent simply a member of the general

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temporal limit on liability for disclosure would be the point at which the authorizing judge notifies the interceptee and related parties of the existence of an application or authorization pursuant to 18 U. S. C. § 2518(8)(d). Such notification must occur "within a reasonable time" after denial of the application or termination of a wiretap, and may be postponed only upon a showing of "good cause." § 2518(8)(d). The parties did not brief this issue, and we need not decide it on these facts because respondent disclosed his knowledge of the wiretap application before Chief Judge Peckham notified the parties in May 1989. That notification issued two years after the FBI first applied for authorization and one year after the last authorized wiretap expired.

public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court. Government officials in sensitive confidential positions may have special duties of nondisclosure. See Fed. Rule Crim. Proc. 6(e) (prohibiting the disclosure of grand jury information). Likewise, protective orders may be imposed in connection with information acquired through civil discovery without violating the First Amendment. *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20, 31 (1984). As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public. See *Snepp* v. *United States*, 444 U. S. 507 (1980) *(per curiam)*. In this case, Chief Judge Peckham postponed the notification of parties named in the application in order to maintain the secrecy of the wiretap. See 18 U. S. C. § 2518(1)(d). We think the Government's interest is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns.

Respondent raised below a challenge to the jury instructions, but the Court of Appeals found it unnecessary to decide. We affirm the decision of the Court of Appeals with respect to respondent's conviction under § 1503 and reverse with respect to respondent's conviction under § 2232(c). We remand for proceedings consistent with this decision.

So ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

Although I agree with the Court's disposition of the 18 U. S. C. § 1503 issue, and also with its rejection of the First

Amendment challenge to respondent's conviction for disclosing a wiretap application under § 2232(c), I believe the Court of Appeals correctly construed § 2232(c) to invalidate respondent's conviction under that statute.

When respondent was convicted of disclosing a 30-day wiretap authorization that had expired months before the disclosure, he was convicted of an attempt to do the impossible: interfere with a nonexistent wiretap. Traditionally, the law does not proscribe an attempt unless the defendant's intent is accompanied by "a dangerous probability that [the unlawful result] will happen." *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905) (Holmes, J.). Whether such a dangerous probability exists, of course, depends ultimately on what result we interpret the statute as having declared unlawful. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.3, pp. 44–45 (1986). In this case, there was no dangerous probability that respondent actually would reveal the existence of a wiretap or wiretap application because none existed to reveal. We should abjure a construction of a criminal statute that leads to criminalizing nothing more than an evil intent accompanied by a harmless act, particularly when, as here, the statutory language does not clearly extend liability so far. Cf. *Simpson* v. *United States*, 435 U. S. 6, 14–15 (1978).

Indeed, the text of § 2232(c) favors a reading that requires, as an essential element of the offense, the possibility of interference with an authorized interception. Both the second and third clauses of the statute support this straightforward interpretation. The second clause requires that the defendant intend to impede "such interception." That phrase refers to an interception that the defendant knows a federal officer "has been authorized or has applied for authorization" to make. After the authorization expires, no "such interception" can occur. Moreover, to infer that "such interception" includes any interception that might be made pursuant to any subsequent reauthorization severely undermines the statute's knowledge requirement by making actual knowledge of an initial, limited authorization the linchpin of liability for disclosing later, entirely conjectural or nonexistent authorizations. That inference contradicts our usual practice of giving strict effect to scienter provisions. See, *e. g., United States* v. *X-Citement Video, Inc.,* 513 U. S. 64, 68–71 (1994).

The third clause of §2232(c) describes the notice that a defendant must attempt to give a third person in order to violate the statute as notice of "*the* possible interception." The definite article necessarily refers to an interception that is "authorized" (or for which federal officers have applied for authorization) per the second clause, thereby imposing authorization as a requirement to satisfy the next word, "possible." I agree with the Court that interceptions prevented by mechanical failures or the departure of the suspect are "possible" within the meaning of the statute, see *ante,* at 603–604, as long as those interceptions, however unlikely, are legally "authorized." The wholly theoretical interception that respondent was convicted of attempting to impede was not authorized, nor had federal officers even sought authorization for it; therefore, it was not "possible" within the meaning of the statute.

The Court's attempt to explain the word "possible" as an assurance that the statute will cover interceptions that may or may not result from a pending application, see *ante,* at 604, is unpersuasive. Because the statute plainly criminalizes disclosures of pending applications, "possible" does not need to do the work the Court assigns it. The phrase "such interception," already used in the second clause, would do just as well. The function of "possible" must be to place some temporal limitation on potential liability under the statute. Under the Court's reasoning, respondent could be found guilty if he had disclosed a 10-year-old application or authorization. The word "possible," properly understood, would prevent such an absurd result by limiting liability to interceptions that could actually be made pursuant to present or pending authorization.

As the Court notes in response to this opinion, see *ibid.*, under its reading the third clause serves to define the *actus reus* element of the crime, just as Congress could have done by replacing the phrase "notice of the possible interception" with the unambiguous phrase "notice of such authorization or application." That unambiguous language, however, would not achieve the temporal limitation on liability that I believe Congress intended to achieve with the words "possible interception." The Court appears to acknowledge the need for such a limitation. See *ante*, at 604–605, n. 3. Rather than recognizing the limitation the statute contains, however, the Court hints that it might in some future case invent one. Limiting liability to the time before the authorizing judge announces the wiretap may well be "plausible," *ibid.*, but no plausible basis exists for finding that limitation in the words of the statute. A wiser course than judicial legislation, I submit, is simply to adopt a literal, reasonable construction of the text that Congress drafted.

I would affirm the decision of the Court of Appeals in its entirety.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join all but Part I and the last paragraph of Part II of the Court's opinion. I would reverse the Court of Appeals, and would uphold respondent's conviction, on the count charging violation of 18 U. S. C. § 1503.

I

The "omnibus clause" of § 1503, under which respondent was charged, provides:

> "Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, ob-

> structs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

This makes criminal not just success in corruptly influencing the due administration of justice, but also the "endeavor" to do so. We have given this latter proscription, which respondent was specifically charged with violating, see App. 106–107, a generous reading: "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes *any effort or essay* to accomplish the evil purpose that the section was enacted to prevent." *United States* v. *Russell*, 255 U. S. 138, 143 (1921) (emphasis added) (interpreting substantially identical predecessor statute). Under this reading of the statute, it is even immaterial whether the endeavor to obstruct pending proceedings is possible of accomplishment. In *Osborn* v. *United States*, 385 U. S. 323, 333 (1966), we dismissed out of hand the "impossibility" defense of a defendant who had sought to convey a bribe to a prospective juror through an intermediary who was secretly working for the Government. "Whatever continuing validity," we said, "the doctrine of 'impossibility' . . . may continue to have in the law of criminal attempt, that body of law is inapplicable here." *Ibid.* (footnote omitted).[1]

Even read at its broadest, however, § 1503's prohibition of "endeavors" to impede justice is not without limits. To "endeavor" means to strive or work for a certain end. Webster's New International Dictionary 844 (2d ed. 1950); 1 New

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[1] This complete disavowal of the impossibility defense may be excessive. As *Pettibone* v. *United States*, 148 U. S. 197 (1893), acknowledged, an endeavor to obstruct proceedings that did not exist would not violate the statute. "[O]bstruction can only arise when justice is being administered." *Id.*, at 207. See, *e. g.*, *United States* v. *Williams*, 874 F. 2d 968, 977 (CA5 1989) ("There are three core elements that the government must establish . . . : (1) there must be a pending judicial proceeding").

Shorter Oxford English Dictionary 816 (1993). Thus, § 1503 reaches only *purposeful* efforts to obstruct the due administration of justice, *i. e.*, acts performed with that very object in mind. See, *e. g., United States* v. *Mullins*, 22 F. 3d 1365, 1370 (CA6 1994); *United States* v. *Ryan*, 455 F. 2d 728, 734 (CA9 1972). This limitation was clearly set forth in our first decision construing § 1503's predecessor statute, *Pettibone* v. *United States*, 148 U. S. 197 (1893), which held an indictment insufficient because it had failed to allege the intent to obstruct justice. That opinion rejected the Government's contention that the intent required to violate the statute could be found in "the intent to commit an unlawful act, in the doing of which justice was in fact obstructed"; to justify a conviction, it said, "the specific intent to violate the statute must exist." *Id.*, at 207. *Pettibone* did acknowledge, however—and here is the point that is distorted to produce today's opinion—that the specific intent to obstruct justice could be found where the defendant intentionally committed a wrongful act that had obstruction of justice as its "natural and probable consequence." *Ibid.*

Today's "nexus" requirement sounds like this, but is in reality quite different. Instead of reaffirming that "natural and probable consequence" is one way of establishing intent, it *substitutes* "'"natural and probable effect"'" *for* intent, requiring that factor even when intent to obstruct justice is otherwise clear. See *ante*, at 599, quoting *United States* v. *Wood*, 6 F. 3d 692, 695 (CA10 1993), which in turn quotes *United States* v. *Thomas*, 916 F. 2d 647, 651 (CA11 1990).[2]

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[2] *Thomas*, which appears to be the origin of this doctrine, made precisely the same mistake the Court does. It cited and misapplied earlier Court of Appeals cases standing for the entirely different principle—flowing from our language in *Pettibone*—that to prove an "endeavor" to obstruct justice, "all the government has to establish is that the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would [obstruct the due administration of justice]." *United States* v. *Silverman*, 745 F. 2d 1386, 1393 (CA11 1984). See also *United States* v. *Fields*, 838 F. 2d 1571, 1573 (CA11 1988). This

But while it is quite proper to derive an *intent* requirement from § 1503's use of the word "endeavor," it is quite impossible to derive a "*natural and probable consequence*" requirement. One would be "endeavoring" to obstruct justice if he intentionally set out to do it by means that would only unnaturally and improbably be successful. As we said in *Russell*, "any effort or essay" corruptly to influence, obstruct, or impede the due administration of justice constitutes a forbidden endeavor, 255 U. S., at 143, even, as we held in *Osborn*, an effort that is *incapable* of having that effect, see 385 U. S., at 333.

The Court does not indicate where its "nexus" requirement is to be found in the words of the statute. Instead, it justifies its holding with the assertion that "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given . . . of what the law intends to do if a certain line is passed." *Ante*, at 600 (citation and internal quotation marks omitted). But "exercising restraint *in assessing the reach* of a federal criminal statute" (which is what the rule of lenity requires, see *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971)) is quite different from importing extratextual requirements *in order to limit the reach* of a federal criminal statute, which is what the Court has done here. By limiting § 1503 to acts having the "natural and probable effect" of interfering with the due administration of justice, the Court effectively reads the word "endeavor," which we said in *Russell* embraced "any effort or essay" to obstruct justice, 255 U. S., at 143, out of the omnibus clause, leaving a prohibition of only actual obstruction and competent attempts.

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does not impose a requirement of "natural and probable consequence," but approves a manner of proof of "intent." See, *e. g., United States* v. *Neiswender*, 590 F. 2d 1269, 1273 (CA4), cert. denied, 441 U. S. 963 (1979).

II

The Court apparently adds to its "natural and probable effect" requirement the requirement that the defendant *know* of that natural and probable effect. See *ante*, at 599 ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct"). Separate proof of such knowledge is not, I think, required for the orthodox use of the "natural and probable effect" rule discussed in *Pettibone:* Where the defendant intentionally commits a wrongful act that *in fact* has the "natural and probable consequence" of obstructing justice, "the unintended wrong may derive its character from the wrong that was intended." 148 U. S., at 207. Or, as we would put the point in modern times, the jury is entitled to presume that a person intends the natural and probable consequences of his acts.

While inquiry into the state of the defendant's knowledge seems quite superfluous to the Court's opinion (since the act performed did not have the requisite "natural and probable effect" anyway), it is necessary to my disposition of the case. As I have said, I think an act committed *with intent to obstruct* is all that matters; and what one can fairly be thought to have intended depends in part upon what one can fairly be thought to have known. The critical point of knowledge at issue, in my view, is not whether "respondent knew that his false statement *would be provided* to the grand jury," *ante*, at 601 (emphasis added) (a heightened burden imposed by the Court's knowledge-of-natural-and-probable-effect requirement), but rather whether respondent knew—or indeed, even erroneously *believed*—that his false statement *might* be provided to the grand jury (which is all the knowledge needed to support the conclusion that the purpose of his lie was to mislead the jury). Applying the familiar standard of *Jackson* v. *Virginia*, 443 U. S. 307 (1979), to the proper question, I find that a rational juror could readily have concluded beyond a reasonable doubt that respondent had corruptly endeavored to impede the due administration of justice, *i. e.*, that he lied to the FBI agents intending to interfere with a grand jury investigation into his misdeeds.

Recorded conversations established that respondent knew a grand jury had been convened, App. 47; that he had been told he was a target of its investigation, *id.*, at 68; and that he feared he would be unable to explain his actions if he were subpoenaed to testify, *id.*, at 51. Respondent himself testified that, at least at the conclusion of the interview, it was his "impression" that his statements to the FBI agents would be reported to the grand jury. 9 Tr. 1360 (Aug. 14, 1990). The evidence further established that respondent made false statements to the FBI agents that minimized his involvement in the matters the grand jury was investigating. See App. 73, 76, 81, 83–84, 86. Viewing this evidence in the light most favorable to the Government, I am simply unable to conclude that no rational trier of fact could have found beyond a reasonable doubt that respondent lied specifically because he thought the agents *might* convey what he said to the grand jury—which suffices to constitute a corrupt endeavor to impede the due administration of justice. In fact, I think it would be hard for a juror to conclude otherwise.

III

Since I find against respondent on the § 1503 count, I must consider several other grounds offered by respondent for affirming the Court of Appeals' setting aside of his conviction. First, invoking the interpretive canon of *ejusdem generis,* he argues that, since all the rest of § 1503 refers only to actions directed at jurors and court officers,[3] the omnibus clause can-

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[3] Those clauses provide:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any not apply to actions directed at witnesses. But the rule of *ejusdem generis*, which "limits general terms which follow specific ones to matters similar to those specified," *Gooch* v. *United States*, 297 U. S. 124, 128 (1936); accord, *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588 (1980), has no application here. Although something of a catchall, the omnibus clause is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable (*e. g.*, "fishing rods, nets, hooks, bobbers, sinkers, and other equipment"). Rather, it is one of the several distinct and independent prohibitions contained in § 1503 that share only the word "Whoever," which begins the statute, and the penalty provision which ends it. Indeed, given the already broad terms of the other clauses in § 1503, to limit the omnibus clause in the manner respondent urges would render it superfluous. See *United States* v. *Howard*, 569 F. 2d 1331, 1333 (CA5 1978).

Respondent next contends that because Congress in 1982 enacted a different statute, 18 U. S. C. § 1512, dealing with witness tampering, and simultaneously removed from § 1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub. L. 97–291, 96 Stat. 1249–1250, 1253, his witness-related conduct is no longer punishable under the omnibus clause of § 1503. The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt "endeavors to influence, obstruct, or impede, the due administration of

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United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1503.

justice." The fact that there is now some overlap between § 1503 and § 1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of § 1503 and the other provisions of § 1503 itself. It hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed. It is not unusual for a particular act to violate more than one criminal statute, see, *e. g., Gavieres* v. *United States,* 220 U. S. 338, 342 (1911), and in such situations the Government may proceed under any statute that applies, see, *e. g., United States* v. *Batchelder,* 442 U. S. 114, 123–124 (1979); *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45–46 (1952). It is, moreover, "a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.,* 425 U. S. 164, 168 (1976); see also *Posadas* v. *National City Bank,* 296 U. S. 497, 503 (1936).

Finally, respondent posits that the phrase " 'corruptly . . . endeavors to influence, obstruct, or impede' may be unconstitutionally vague," in that it fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a longstanding and well-accepted meaning. It denotes "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another." *United States* v. *Ogle,* 613 F. 2d 233, 238 (CA10) (internal quotation marks omitted), cert. denied, 449 U. S. 825 (1980). See also Ballentine's Law Dictionary 276 (3d ed. 1969); Black's Law Dictionary 345 (6th ed. 1990). As the District Court here instructed the jury:

> "An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or

> expectation of either financial gain or other benefit to oneself or a benefit of another person." App. 117.

Moreover, in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible. Acts specifically intended to "influence, obstruct, or impede, the due administration of justice" are obviously wrongful, just as they are necessarily "corrupt." See *Ogle, supra,* at 239; *United States* v. *North,* 910 F. 2d 843, 941 (CADC) (Silberman, J., concurring in part and dissenting in part), modified, 920 F. 2d 940 (1990); *United States* v. *Reeves,* 752 F. 2d 995, 999 (CA5), cert. denied, 474 U. S. 834 (1985).

* * *

The "nexus" requirement that the Court today engrafts into § 1503 has no basis in the words Congress enacted. I would reverse that part of the Court of Appeals' judgment which set aside respondent's conviction under that statute.

FLORIDA BAR *v.* WENT FOR IT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94–226. Argued January 11, 1995—Decided June 21, 1995

Respondent lawyer referral service and an individual Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar (Bar) Rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Bar Rules do not violate the First and Fourteenth Amendments. Pp. 622–635.

(a) *Bates* and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the "intermediate" scrutiny framework set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "'narrowly drawn,'" *id.*, at 564–565. Pp. 622–624.

(b) The Bar's 30-day ban on targeted direct-mail solicitation withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. Second, the fact that the harms targeted by the ban are quite real is demonstrated by a Bar study, effectively unrebutted by respondents below, that contains extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. *Edenfield* v. *Fane*, 507 U. S. 761, 771–772; *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 475–476; and *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 72, distinguished. Third, the ban's scope is reasonably well tailored to its stated objectives. Moreover, its duration is limited to a brief 30-day period, and there are many other ways for injured Floridians to learn about the availability of legal representation during that time. Pp. 624–634.

21 F. 3d 1038, reversed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Thomas, and Breyer, JJ., joined. Kennedy, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined, *post*, p. 635.

Barry Scott Richard argued the cause for petitioner. With him on the briefs were *William F. Blews* and *John A. DeVault III.*

Bruce S. Rogow argued the cause for respondents. With him on the briefs were *Beverly A. Pohl* and *Howell L. Ferguson.**

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*Briefs of *amici curiae* urging reversal were filed for the Dade County Trial Lawyers Association et al. by *Robert D. Peltz* and *Robert G. Vial;* for the Academy of Florida Trial Lawyers by *C. Rufus Pennington III;* and for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Larry S. Stewart.*

Briefs of *amici curiae* urging affirmance were filed for the Institute for Injury Reduction by *Larry E. Coben;* for the Media Institute et al. by *John J. Walsh, Steven G. Brody, Mary Elizabeth Taylor, P. Cameron DeVore,* and *David M. Hunsaker;* and for Public Citizen by *David C. Vladeck.*

Briefs of *amici curiae* were filed for the Alabama State Bar Association et al. by *James L. Branton, Broox G. Holmes, Robert L. Jones III, Miriam Cyrulnik, Frances A. Koncilja, Francisco R. Angones, R. Franklin Balotti, Floyd Shapiro, Harold Turner Daniel, Jr., David A. Decker, Nicholas V. Critelli, Jr., Hedo Zacherle, Henry M. Coxe III, Stephen D. Wolnitzek, Marcia L. Proctor, W. Scott Welch III, Michael B. Martz, Robert J. Phillips, Grace D. Moran, Benedict J. Pollio, William B. McGuire, Albert L. Bell, J. Rutledge Young, Jr., John H. Gross, Harris A. Gilbert,* and *Steven Trost;* for the New York State Bar Association by *G. Robert Witmer, Jr.;* for Hyatt Legal Services by *Andrew Kohn;* and for the Institute for Access to Legal Services et al. by *Bruce J. Ennis, Jr., Donald B. Verrilli, Jr.,* and *Nory Miller.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar (Bar) completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451 (Fla. 1990). Two of these amendments are at issue in this case. Rule 4–7.4(b)(1) provides that "[a] lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4–7.8(a) states that "[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these Rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4–7.4(b)(1) and 4–7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit, *Florida Bar* v. *McHenry*, 605 So. 2d 459 (Fla. 1992). Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, 808 F. Supp. 1543 (MD Fla. 1992), relying on *Bates* v. *State Bar of Ariz.*, 433 U. S. 350 (1977), and subsequent cases. The Eleventh Circuit affirmed on similar grounds, *McHenry* v. *Florida Bar,* 21 F. 3d 1038 (1994). The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached, 21 F. 3d, at 1045. We granted certiorari, 512 U. S. 1289 (1994), and now reverse.

II

A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid-1970's, we adhered to the broad rule laid out in *Valentine* v. *Chrestensen,* 316 U. S. 52, 54 (1942), that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising." In 1976, the Court changed course. In *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, we invalidated a state statute barring pharmacists from advertising prescription drug prices. At issue was speech that involved the idea that " 'I will sell you the X prescription drug at the Y price.' " *Id.,* at 761. Striking the ban as unconstitutional, we rejected the argument that such speech "is so removed from 'any exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.,* at 762 (citations omitted).

In *Virginia Bd.,* the Court limited its holding to advertising by pharmacists, noting that "[p]hysicians and lawyers . . . do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.,* at 773, n. 25 (emphasis in original). One year later, however, the Court applied the *Virginia Bd.* principles to invalidate a state rule prohibiting lawyers from advertising in newspapers and other media. In *Bates* v. *State Bar of Arizona*, *supra*, the Court struck a ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." 433 U. S., at 372. Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation.

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. See, *e. g.*, *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 472 (1988); *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 637 (1985); *In re R. M. J.*, 455 U. S. 191, 199 (1982). Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. " '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 477 (1989), quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). We have observed that " '[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.' " 492 U. S., at 481, quoting *Ohralik*, *supra*, at 456.

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.*, at 563–564. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be " 'narrowly drawn.' " *Id.*, at 564–565.

B

"Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions," *Edenfield* v. *Fane*, 507 U. S. 761, 768 (1993). The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. See Brief for Petitioner 8, 25–27; 21 F. 3d, at 1043–1044.[1] This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affec[t] the administration of justice." *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d, at 455; see also Brief for Petitioner 7, 14, 24; 21 F. 3d, at 1043 (describing Bar's effort "to preserve the integrity of the legal profession").

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[1] At prior stages of this litigation, the Bar asserted a different interest, in addition to that urged now, in protecting people against undue influence and overreaching. See 21 F. 3d, at 1042–1043; cf. *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 474–476 (1988); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462 (1978). Because the Bar does not press this interest before us, we do not consider it. Of course, our precedents do not require the Bar to point to more than one interest in support of its 30-day restriction; a single substantial interest is sufficient to satisfy *Central Hudson*'s first prong. See *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 485 (1995) (deeming only one of the government's proffered interests "substantial").

Because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. See Pet. for Cert. 14–15; Brief for Petitioner 28–29. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, " 'is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.' " Brief for Petitioner 28, quoting *In re Anis,* 126 N. J. 448, 458, 599 A. 2d 1265, 1270 (1992).

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792 (1975); see also *Ohralik, supra,* at 460; *Cohen* v. *Hurley,* 366 U. S. 117, 124 (1961). Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." See *Edenfield, supra,* at 769. In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey* v. *Brown,* 447 U. S. 455, 471 (1980). Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Frisby* v. *Schultz,* 487 U. S. 474, 484–485 (1988).

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest 'in a direct and material way.' "

Rubin v. *Coors Brewing Co.*, 514 U. S. 476, 487 (1995), quoting *Edenfield, supra,* at 767. That burden, we have explained, "'is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" 514 U. S., at 487, quoting *Edenfield, supra,* at 770–771. In *Edenfield,* the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPA's). We observed that the State Board of Accountancy had "present[ed] no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." 507 U. S., at 771. Moreover, "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions." *Ibid.* In fact, we concluded that the only evidence in the record tended to "contradic[t], rather than strengthe[n], the Board's submissions." *Id.,* at 772. Finding nothing in the record to substantiate the State's allegations of harm, we invalidated the regulation.

The direct-mail solicitation regulation before us does not suffer from such infirmities. The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. Summary of the Record in No. 74,987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising (hereinafter Summary of Record), App. H, p. 2. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Magid Associates, Attitudes & Opinions Toward Direct Mail Advertising by Attorneys (Dec. 1987), Summary of Record, App. C(4), p. 6. Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.*, at 7. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." *Ibid.* Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail. *Ibid.*

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" (The Miami Herald, Sept. 29, 1987) and "Solicitors Out of Bounds" (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. See Summary of Record, App. B, pp. 1–8 (excerpts from articles); see also Peltz, Legal Advertising—Opening Pandora's Box, 19 Stetson L. Rev. 43, 116 (1989) (listing Florida editorials critical of direct-mail solicitation of accident victims in 1987, several of which are referenced in the record). The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "'appalled and angered by the brazen attempt'" of a law firm to solicit him by letter shortly after he was injured and his fiancee was killed in an auto accident. Summary of Record, App. I(1), p. 2. Another found it "'despicable and inexcusable'" that a Pensacola lawyer wrote to his mother three days after his father's funeral. *Ibid.* Another described how she was "'astounded'" and then "'very angry'" when she received a solicitation following a minor accident. *Id.*, at 3. Still another described as "'beyond comprehension'" a letter his nephew's family received the day of the nephew's funeral. *Ibid.* One citizen wrote, "'I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind.'" *Ibid.*

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked "any factual basis," Plaintiffs' Motion for Summary Judgment and Supplementary Memorandum of Law in No. 92–370–Civ. (MD Fla.), p. 5—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, JUSTICE KENNEDY complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. See *post*, at 640. As stated, we believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield* v. *Fane*, 507 U. S. 761 (1993). In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50–51 (1986); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 584–585 (1991) (SOUTER, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992). Nothing in *Edenfield*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield*, targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988). Making no mention of the Bar's study, the court concluded that " 'a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.' " 21 F. 3d, at 1044, quoting *Shapero, supra*, at 476. In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper." 21 F. 3d, at 1044.

While some of *Shapero*'s language might be read to support the Court of Appeals' interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero*'s treatment of privacy was casual. Contrary to the dissent's suggestions, *post*, at 637–638, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. See generally Brief for Respondent in *Shapero* v. *Kentucky Bar Assn.*, O. T. 1987, No. 87–16. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. *Ibid.* Second, in contrast to this case, *Shapero* dealt with a broad ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching. 486 U. S., at 475. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

We find the Court's perfunctory treatment of privacy in *Shapero* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." Brief for Petitioner 8; cf. Summary of Record, App. I(1) (citizen commentary describing outrage at lawyers' timing in sending solicitation letters). The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Bar's study.

Nor do we find *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), dispositive of the issue, despite any superficial resemblance. In *Bolger*, we rejected the Federal Government's paternalistic effort to ban potentially "offensive" and "intrusive" direct-mail advertisements for contraceptives. Minimizing the Government's allegations of harm, we reasoned that "[r]ecipients of objectionable mailings . . . may '"effectively avoid further bombardment of their sensibilities simply by averting their eyes."'" *Id.*, at 72, quoting *Con-*

solidated Edison Co. of N. Y. v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 542 (1980), in turn quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971). We found that the "'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'" 463 U. S., at 72 (ellipses in original), quoting *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (SDNY), summarily aff'd, 386 F. 2d 449 (CA2 1967). Concluding that citizens have at their disposal ample means of averting any substantial injury inhering in the delivery of objectionable contraceptive material, we deemed the State's intercession unnecessary and unduly restrictive.

Here, in contrast, the harm targeted by the Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, see *post*, at 638–639, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. See Brief for Petitioner 7, 14, 24, 28.[2] Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former. We see no basis in *Bolger*, nor in the other, similar cases cited by the dissent, *post*, at 638–639, for dismissing the Bar's assertions of harm, particularly given the unrefuted empirical and anecdotal basis for the Bar's conclusions.

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[2] Missing this nuance altogether, the dissent asserts apocalyptically that we are "unsettl[ing] leading First Amendment precedents," *post*, at 635, 639–640. We do no such thing. There is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism. The cases cited by the dissent, *post*, at 638–639, focus on the latter situation.

Passing to *Central Hudson*'s third prong, we examine the relationship between the Bar's interests and the means chosen to serve them. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S., at 480. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context. *Ibid.* "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Ibid.* (citations omitted). Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417, n. 13 (1993), for example, we observed that the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."

Respondents levy a great deal of criticism, echoed in the dissent, *post*, at 642–644, at the scope of the Bar's restriction on targeted mail. "[B]y prohibiting written communications to all people, whatever their state of mind," respondents charge, the Rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." Brief for Respondents 14. This criticism may be parsed into two components. First, the Rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. *Id.*, at 15. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less-burdensome alternatives" to Florida's short temporal ban. *Cincinnati*, *supra*, at 417, n. 13. The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar ("[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4–7.4"); *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues,* 571 So. 2d, at 461. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent, see *post,* at 643. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. See, *e. g.,* Summary of Record, App. C(4), p. 7; *id.,* App. C(5), p. 8. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, *e. g., Gentile* v. *State Bar of Nevada,* 501 U. S. 1030 (1991); *In re Primus,* 436 U. S. 412 (1978). This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "'subordinate position'" of commercial speech in the scale of First Amendment values. *Fox*, 492 U. S., at 477, quoting *Ohralik*, 436 U. S., at 456.

We believe that the Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is

Reversed.

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates* v. *State Bar of Ariz.*, 433 U. S. 350 (1977). The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. See, *e. g.*, *Edenfield* v. *Fane*, 507 U. S. 761, 766–767 (1993). If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. *Ante*, at 624. The State says two different interests meet this standard. The first is the interest "in protecting the personal privacy and tranquility" of the victim and his or her family. Brief for Petitioner 8. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988). In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero*, like this case, involved a direct-mail solicitation, and there the State recited its fears of "overreaching and undue influence." *Id.*, at 475. We found, however, no such dangers presented by direct-mail advertising. We reasoned that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.*, at 475–476. We pointed out that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.*, at 474. In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." *Id.*, at 475. The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (a lawyer's direct, in-person solicitation of personal injury business may be prohibited by the State). See also *Edenfield, supra* (an accountant's direct, in-person solicitation of accounting business did implicate a privacy interest, though not one permitting state suppression of speech when other factors were considered).

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." *Carey* v. *Population Services Int'l,* 431 U. S. 678, 701 (1977). And in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.*, at 648.

We have applied this principle to direct-mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 76 (1983) (REHNQUIST, J., concurring) (citing *Blount* v. *Rizzi*, 400 U. S. 410 (1971)). In *Bolger*, we held that a statute designed to "shiel[d] recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 463 U. S., at 71 (citing *Carey, supra*, at 701). It is only where an audience is captive that we will assure its protection from some offensive speech. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 542 (1980). Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Bolger, supra,* at 72. The occupants of a household receiving mailings are not a captive audience, 463 U. S., at 72, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectional mailings need do is to take "the 'short, though regular, journey from mail box to trash can.'" *Ibid.* (citation omitted). As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." *Ibid.* If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the *amicus* brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as *amicus* the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted state interest in a direct and material way. *Edenfield*, 507 U. S., at 771. The burden of demonstrating the reality of the asserted harm rests on the State. *Ibid.* Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. See *ante*, at 626. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," *ante*, at 627, but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech. See, *e. g., Edenfield,* 507 U. S., at 771–772.

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record. . . and I don't know the answer to that question." Tr. of Oral Arg. 25. Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson,* 447 U. S., at 569–571; *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 480 (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, see *ante,* at 633, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, see, *e. g.,* United States Sentencing Commission, Guidelines Manual § 1B1.1, comment., n. 1(b), (h), (j) (Nov. 1994), and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement. *Ante,* at 633.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents.

The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services. Cf. *Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3–4 (1964).

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. See, *e. g.*, Rules Regulating the Florida Bar, Rule 4–1.5 (Statement of Client's Rights) (effective Jan. 1, 1993). The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. N. Y. Times, June 11, 1995, section 3, p. 1, col. 1. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct-mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates* v. *State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," see *Shapero*, 486 U. S., at 490 (O'CONNOR, J., dissenting), the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients." *Ohralik*, 436 U. S., at 461.

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U. S., at 767. By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

VERNONIA SCHOOL DISTRICT 47J *v.* ACTON ET UX., GUARDIANS AD LITEM FOR ACTON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–590. Argued March 28, 1995—Decided June 26, 1995

Motivated by the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury, petitioner school district (District) adopted the Student Athlete Drug Policy (Policy), which authorizes random urinalysis drug testing of students who participate in its athletics programs. Respondent Acton was denied participation in his school's football program when he and his parents (also respondents) refused to consent to the testing. They then filed this suit, seeking declaratory and injunctive relief on the grounds that the Policy violated the Fourth and Fourteenth Amendments and the Oregon Constitution. The District Court denied the claims, but the Court of Appeals reversed, holding that the Policy violated both the Federal and State Constitutions.

Held: The Policy is constitutional under the Fourth and Fourteenth Amendments. Pp. 652–666.

(a) State-compelled collection and testing of urine constitutes a "search" under the Fourth Amendment. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 617. Where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, the "reasonableness" of a search is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests. Pp. 652–654.

(b) The first factor to be considered in determining reasonableness is the nature of the privacy interest on which the search intrudes. Here, the subjects of the Policy are children who have been committed to the temporary custody of the State as schoolmaster; in that capacity, the State may exercise a degree of supervision and control greater than it could exercise over free adults. The requirements that public school children submit to physical examinations and be vaccinated indicate that they have a lesser privacy expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct. Pp. 654–657.

(c) The privacy interests compromised by the process of obtaining urine samples under the Policy are negligible, since the conditions of collection are nearly identical to those typically encountered in public restrooms. In addition, the tests look only for standard drugs, not medical conditions, and the results are released to a limited group. Pp. 658–660.

(d) The nature and immediacy of the governmental concern at issue, and the efficacy of this means for meeting it, also favor a finding of reasonableness. The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover, the Policy is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high. The District Court's conclusion that the District's concerns were immediate is not clearly erroneous, and it is self-evident that a drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs. The Fourth Amendment does not require that the "least intrusive" search be conducted, so respondents' argument that the drug testing could be based on suspicion of drug use, if true, would not be fatal; and that alternative entails its own substantial difficulties. Pp. 660–664.

23 F. 3d 1514, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 666. O'CONNOR, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 666.

Timothy R. Volpert argued the cause for petitioner. With him on the briefs was *Claudia Larkins*.

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Bender, Leonard Schaitman*, and *Edward Himmelfarb*.

Thomas M. Christ argued the cause for respondents. With him on the brief were *John A. Wittmayer* and *Steven R. Shapiro.*[*]

JUSTICE SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems.

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[*] Briefs of *amici curiae* urging reversal were filed for the American Alliance for Rights & Responsibilities by *Steven P. Fulton* and *Robert Teir;* for the California Interscholastic Federation by *Andrew Patterson;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the Institute for a Drug-Free Workplace by *Benjamin W. Hahn;* for the National League of Cities et al. by *Richard Ruda* and *Lee Fennell;* for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon;* for Paradise Valley Unified School District No. 69 by *Thomas C. Horne;* and for the Washington Legal Foundation et al. by *Richard K. Willard, Daniel J. Popeo,* and *David A. Price.*

Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. 796 F. Supp. 1354, 1357 (Ore. 1992). This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:

> "[T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture." *Ibid.*

At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

C

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. 796 F. Supp., at 1355. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution. 23 F. 3d 1514 (1994). We granted certiorari. 513 U. S. 1013 (1994).

II

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins* v. *United States*, 364 U. S. 206, 213 (1960), including public school officials, *New Jersey* v. *T. L. O.*, 469 U. S. 325, 336–337 (1985). In *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 617 (1989), we held that state-compelled collection and testing of urine, such as that required by the Policy, constitutes a "search" subject to the demands of the Fourth Amendment. See also *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 665 (1989).

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted,[1] whether a particular search meets the reasonableness standard " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner, supra,* at 619 (quoting *Delaware* v. *Prouse,* 440 U. S. 648, 654 (1979)). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, *Skinner, supra,* at 619. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin,* 483 U. S. 868, 873 (1987) (internal quotation marks omitted).

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[1] Not until 1852 did Massachusetts, the pioneer in the "common school" movement, enact a compulsory school-attendance law, and as late as the 1870's only 14 States had such laws. R. Butts, Public Education in the United States From Revolution to Reform 102–103 (1978); 1 Children and Youth in America 467–468 (R. Bremner ed. 1970). The drug problem, and the technology of drug testing, are of course even more recent.

We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *T. L. O.,* 469 U. S., at 340, 341. The school search we approved in *T. L. O.,* while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, "'the Fourth Amendment imposes no irreducible requirement of such suspicion,'" *id.,* at 342, n. 8 (quoting *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 560–561 (1976)). We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, see *Skinner, supra;* to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, see *Von Raab, supra;* and to maintain automobile checkpoints looking for illegal immigrants and contraband, *Martinez-Fuerte, supra,* and drunk drivers, *Michigan Dept. of State Police* v. *Sitz,* 496 U. S. 444 (1990).

III

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T. L. O.,* 469 U. S., at 338. What expectations are legitimate varies, of course, with context, *id.,* at 337, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin, supra,* we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendmen[t]," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." 483 U. S., at 873, 875. Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i. e.,* the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am. Jur. 2d, Parent and Child § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 W. Blackstone, Commentaries on the Laws of England 441 (1769).

In *T. L. O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. 469 U. S., at 336. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" *ibid.* (quoting *Ingraham* v. *Wright,* 430 U. S. 651, 662 (1977)), and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses, *T. L. O., supra,* at 336. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T. L. O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 U. S., at 339. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," see *DeShaney* v. *Winnebago County Dept. of Social Servs.,* 489 U. S. 189, 200 (1989), we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis,*" *Bethel School Dist. No. 403* v. *Fraser,* 478 U. S. 675, 684 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," *id.,* at 681 (internal quotation marks omitted). Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969), the nature of those rights is what is appropriate for children in school. See, *e. g.*, *Goss* v. *Lopez*, 419 U. S. 565, 581–582 (1975) (due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred"); *Fraser*, *supra*, at 683 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 273 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Ingraham*, *supra*, at 682 ("Imposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility").

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991–1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio. U. S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991–1992, p. 1. Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T. L. O., supra,* at 348 (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1318 (1988).

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App. 17), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Record, Exh. 2, p. 30, ¶ 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner,* 489 U. S., at 627; *United States* v. *Biswell,* 406 U. S. 311, 316 (1972).

IV

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." 489 U. S., at 626. We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. *Ibid.* Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. See *id.*, at 617. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function. 796 F. Supp., at 1364; see also 23 F. 3d, at 1521.[2]

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[2] Despite the fact that, like routine school physicals and vaccinations—which the dissent apparently finds unobjectionable even though they "are both blanket searches of a sort," *post*, at 682—the search here is undertaken for prophylactic and distinctly *non*punitive purposes (protecting

Respondents argue, however, that the District's Policy is in fact more intrusive than this suggests, because it requires the students, if they are to avoid sanctions for a falsely positive test, to identify *in advance* prescription medications they are taking. We agree that this raises some cause for concern. In *Von Raab,* we flagged as one of the salutary features of the Customs Service drug-testing program the fact that employees were not required to disclose medical information unless they tested positive, and, even then, the information was supplied to a licensed physician rather than to the Government employer. See *Von Raab,* 489 U. S., at 672–673, n. 2. On the other hand, we have never indicated that requiring advance disclosure of medications is *per se* unreasonable. Indeed, in *Skinner* we held that it was not "a significant invasion of privacy." 489 U. S., at 626, n. 7. It can be argued that, in *Skinner,* the disclosure went only to the medical personnel taking the sample, and the Government personnel analyzing it, see *id.,* at 609, but see *id.,* at 610 (railroad personnel responsible for forwarding the sample, and presumably accompanying information, to the Government's testing lab); and that disclosure to teachers and coaches—to persons who personally *know* the student—is a greater invasion of privacy. Assuming for the sake of argu-

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student athletes from injury, and deterring drug use in the student population), see 796 F. Supp., at 1363, the dissent would nonetheless lump this search together with "evidentiary" searches, which generally require probable cause, see *supra,* at 653, because, from the student's perspective, the test may be "regarded" or "understood" as punishment, *post,* at 683–684. In light of the District Court's findings regarding the purposes and consequences of the testing, any such perception is by definition an irrational one, which is protected nowhere else in the law. In any event, our point is not, as the dissent apparently believes, *post,* at 682–683, that *since* student vaccinations and physical exams are constitutionally reasonable, student drug testing must be so as well; but rather that, by reason of those prevalent practices, public school children in general, and student athletes in particular, have a diminished expectation of privacy. See *supra,* at 656–657.

ment that both those propositions are true, we do not believe they establish a difference that respondents are entitled to rely on here.

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." App. 10–11. While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, see *id.*, at 29, 42, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." *Id.*, at 8. It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in *Skinner:* that the invasion of privacy was not significant.

V

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as "compelling." *Skinner, supra,* at 628 (interest in preventing railway accidents); *Von Raab*, *supra*, at 670 (interest in ensuring fitness of customs officials to interdict drugs and handle firearms). Relying on these cases, the District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." 796 F. Supp., at 1363. The Court of Appeals appears to have agreed with this view. See 23 F. 3d, at 1526. It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab, supra,* at 668, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra,* at 628. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Hawley, The Bumpy Road to Drug-Free Schools, 72 Phi Delta Kappan 310, 314 (1990). See also Estroff, Schwartz, & Hoffmann, Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects, 28 Clinical Pediatrics 550

(Dec. 1989); Kandel, Davies, Karus, & Yamaguchi, The Consequences in Young Adulthood of Adolescent Drug Involvement, 43 Arch. Gen. Psychiatry 746 (Aug. 1986). And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Hawkins, Drugs and Other Ingesta: Effects on Athletic Performance, in H. Appenzeller, Managing Sports and Risk Management Strategies 90, 90–91 (1993). Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.*, at 94. Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Ibid.*

As for the immediacy of the District's concerns: We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F. Supp., at 1357. That is an immediate crisis of greater proportions than existed in *Skinner,* where we upheld the Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. See *Skinner,* 489 U. S., at 607. And of much greater proportions than existed in *Von Raab,* where there was no documented history of drug use by any customs officials. See *Von Raab,* 489 U. S., at 673; *id.,* at 683 (SCALIA, J., dissenting).

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45–46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. *Skinner, supra,* at 629, n. 9 (collecting cases). Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. Cf. *Skinner, supra,* at 628 (quoting 50 Fed. Reg. 31526 (1985)) (a drug impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician' "); *Goss,* 419 U. S., at 594 (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature . . .") (footnote omitted). In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.[3]

VI

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

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[3] There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the Fourth Amendment status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the "categorical protection" of a "strong preference for an individualized suspicion requirement," *post,* at 681. The case on which it relies for that proposition, *Bell* v. *Wolfish,* 441 U. S. 520 (1979), displays no stronger a preference for individualized suspicion than we do today. It reiterates the proposition on which we rely, that " 'elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.' " *Id.,* at 559, n. 40 (quoting *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 556–557, n. 12 (1976)). Even *Wolfish*'s *arguendo* "assum[ption] that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue," 441 U. S., at 559, n. 40, does not support the dissent, for the opinion ultimately rejected the hypothesized alternative (as we do) on the ground that it would impair other policies important to the institution. See *id.,* at 560, n. 40 (monitoring of visits instead of conducting body searches would destroy "the confidentiality and intimacy that these visits are intended to afford").

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.[4] Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see *O'Connor* v. *Ortega,* 480 U. S. 709 (1987); so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

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[4] The dissent devotes a few meager paragraphs of its 21 pages to this central aspect of the testing program, see *post,* at 680–682, in the course of which it shows none of the interest in the original meaning of the Fourth Amendment displayed elsewhere in the opinion, see *post,* at 669–671. Of course at the time of the framing, as well as at the time of the adoption of the Fourteenth Amendment, children had substantially fewer "rights" than legislatures and courts confer upon them today. See 1 D. Kramer, Legal Rights of Children § 1.02, p. 9 (2d ed. 1994); Wald, Children's Rights: A Framework for Analysis, 12 U. C. D. L. Rev. 255, 256 (1979).

* * *

The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. *Ante*, at 650, 657 (reduced privacy expectation and closer school regulation of student athletes), 662 (drug use by athletes risks immediate physical harm to users and those with whom they play). Correspondingly, the most severe sanction allowed under the District's policy is suspension from extracurricular athletic programs. *Ante*, at 651. I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. Cf. *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (Friendly, J.) (in contrast to search without notice and opportunity to avoid examination, airport search of passengers and luggage is avoidable "by choosing not to travel by air") (internal quotation marks omitted).

JUSTICE O'CONNOR, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. See U. S. Dept. of

Education, National Center for Education Statistics, Digest of Education Statistics 58 (1994) (Table 43). By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affec[t] one person at a time," *Illinois* v. *Krull*, 480 U. S. 340, 365 (1987) (O'CONNOR, J., dissenting). Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better," *ante*, at 664, than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

I

A

In *Carroll* v. *United States*, 267 U. S. 132 (1925), the Court explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.*, at 147. Applying this standard, the Court first held that a search of a car was not unreasonable merely because it was warrantless; because obtaining a warrant is impractical for an easily movable object such as a car, the Court explained, a warrant is not required. The Court also held, however, that a warrantless car search *was* unreasonable unless supported by some level of individualized suspicion, namely, probable cause. Significantly, the Court did not base its conclusion on the *express* probable cause requirement contained in the Warrant Clause, which, as just noted, the Court found inapplicable. Rather, the Court rested its views on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted" and "[what] will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149. With respect to the "rights of individual citizens," the Court eventually offered the simple yet powerful intuition that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 154.

More important for the purposes of this case, the Court clearly indicated that evenhanded treatment was no substitute for the individualized suspicion requirement:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on

> the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*, at 153–154.

The *Carroll* Court's view that blanket searches are "intolerable and unreasonable" is well grounded in history. As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (Ph.D. Dissertation at Claremont Graduate School) (hereinafter Cuddihy), what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority. See *id.*, at 1402, 1499, 1555; see also Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 Mem. St. U. L. Rev. 483, 528 (1994); Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S. Cal. L. Rev. 1, 9–12 (1994); L. Levy, Original Intent and the Framers' Constitution 221–246 (1988). Although, ironically, such warrants, writs, and statutes typically required individualized suspicion, see, *e. g.*, Cuddihy 1140 ("Typical of the American warrants of 1761–76 was Starke's 'tobacco' warrant, which commanded its bearer to 'enter any *suspected* Houses' ") (emphasis added), such requirements were subjective and largely unenforceable. Accordingly, these various forms of authority led in practice to "virtually unrestrained," and hence "general," searches. J. Landynski, Search and Seizure and the Supreme Court 20 (1966). To be sure, the Fourth Amendment, in the Warrant Clause, prohibits by name only searches by general warrants. But that was only because the abuses of the general warrant were particularly vivid in the minds of the Framers' generation, Cuddihy 1554–1560, and not because the Framers viewed other kinds of general searches as any less unreasonable. "Prohibition of the general warrant was part of a larger scheme to extinguish general searches categorically." *Id.*, at 1499.

More important, there is no indication in the historical materials that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group. See *Delaware* v. *Prouse,* 440 U. S. 648, 664 (1979) (REHNQUIST, J., dissenting) (referring to this as the "'misery loves company'" theory of the Fourth Amendment). On the contrary, although general searches were typically arbitrary, they were not invariably so. Some general searches, for example, were of the arguably evenhanded "door-to-door" kind. Cuddihy 1091; see also *id.,* at 377, 1502, 1557. Indeed, Cuddihy's descriptions of a few blanket searches suggest they may have been considered *more* worrisome than the typical general search. See *id.,* at 575 ("One type of warrant [between 1700 and 1760] went beyond a general search, in which the searcher entered and inspected suspicious places, by requiring him to search entire categories of places whether he suspected them or not"); *id.,* at 478 ("During the exigencies of Queen Anne's War, two colonies even authorized searches in 1706 that extended to entire geographic areas, not just to suspicious houses in a district, as conventional general warrants allowed").

Perhaps most telling of all, as reflected in the text of the Warrant Clause, the particular way the Framers chose to curb the abuses of general warrants—and by implication, *all* general searches—was not to impose a novel "evenhandedness" requirement; it was to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause. See U. S. Const., Amdt. 4. So, for example, when the same Congress that proposed the Fourth Amendment authorized duty collectors to search for concealed goods subject to import duties, specific warrants were required for searches on land; but even for searches at sea, where warrants were impractical and thus not required, Congress nonetheless limited officials to searching only those ships and vessels "in which [a collector] *shall have reason to suspect* any goods, wares or merchandise subject to duty shall be concealed." The Collection Act of July 31, 1789, § 24, 1 Stat. 43 (emphasis added); see also Cuddihy 1490–1491 ("The Collection Act of 1789 was [the] most significant [of all early search statutes], for it identified the techniques of search and seizure that the framers of the amendment believed reasonable while they were framing it"). Not surprisingly, the *Carroll* Court relied on this statute and other subsequent ones like it in arriving at its views. See *Carroll*, 267 U. S., at 150–151, 154; cf. Clancy, *supra*, at 489 ("While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures").

True, not all searches around the time the Fourth Amendment was adopted required individualized suspicion—although most did. A search incident to arrest was an obvious example of one that did not, see Cuddihy 1518, but even those searches shared the essential characteristics that distinguish suspicion-based searches from abusive general searches: they only "affec[t] one person at a time," *Krull*, 480 U. S., at 365 (O'CONNOR, J., dissenting), and they are generally avoidable by refraining from wrongdoing. See *supra*, at 667. Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.

The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context, see *Ybarra* v. *Illinois*, 444

U. S. 85 (1979) (invalidating evenhanded, nonaccusatory patdown for weapons of all patrons in a tavern in which there was probable cause to think drug dealing was going on), at least where the search is more than minimally intrusive, see *Michigan Dept. of State Police* v. *Sitz,* 496 U. S. 444 (1990) (upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock). It is worth noting in this regard that state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, see, *e. g., Bell* v. *Wolfish,* 441 U. S. 520, 558–560 (1979) (visual body cavity searches), is still "particularly destructive of privacy and offensive to personal dignity." *Treasury Employees* v. *Von Raab,* 489 U. S. 656, 680 (1989) (SCALIA, J., dissenting); see also *ante,* at 658; *Skinner* v. *Railway Labor Executives' Assn.,* 489 U. S. 602, 617 (1989). We have not hesitated to treat monitored bowel movements as highly intrusive (even in the special border search context), compare *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976) (brief interrogative stops of all motorists crossing certain border checkpoint reasonable without individualized suspicion), with *United States* v. *Montoya de Hernandez,* 473 U. S. 531 (1985) (monitored bowel movement of border crossers reasonable only upon reasonable suspicion of alimentary canal smuggling), and it is not easy to draw a distinction. See Fried, Privacy, 77 Yale L. J. 475, 487 (1968) ("[I]n our culture the excretory functions are shielded by more or less absolute privacy"). And certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protections in the past. See, *e. g., Cupp* v. *Murphy,* 412 U. S. 291, 295 (1973) (Stewart, J.) (characterizing the scraping of dirt from under a person's fingernails as a " 'severe, though brief, intrusion upon cherished personal security' ") (citation omitted). Finally, the collection and testing of urine is, of course, a search of a person, one of only four categories of suspect searches the Constitution mentions by name. See U. S. Const., Amdt. 4 (listing "persons, houses, papers, and effects"); cf. Cuddihy 835, 1518, 1552, n. 394 (indicating long history of outrage at personal searches before 1789).

Thus, it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. 3 W. LaFave, Search and Seizure § 9.5(b), pp. 551–553 (2d ed. 1987) (hereinafter LaFave). And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is *some* category of searches for which individualized suspicion is nonnegotiable, see 2 LaFave § 4.1, at 118, would be a dead letter.

Outside the criminal context, however, in response to the exigencies of modern life, our cases have upheld several evenhanded blanket searches, including some that are more than minimally intrusive, after balancing the invasion of privacy against the government's strong need. Most of these cases, of course, are distinguishable insofar as they involved searches either not of a personally intrusive nature, such as searches of closely regulated businesses, see, *e. g., New York* v. *Burger,* 482 U. S. 691, 699–703 (1987); cf. Cuddihy 1501 ("Even the states with the strongest constitutional restrictions on general searches had long exposed commercial establishments to warrantless inspection"), or arising in unique contexts such as prisons, see, *e. g., Wolfish, supra,* at 558–560 (visual body cavity searches of prisoners following contact visits); cf. Cuddihy 1516–1519, 1552–1553 (indicating that searches incident to arrest and prisoner searches were the only common personal searches at time of founding). This certainly explains why JUSTICE SCALIA, in his dissent in our recent *Von Raab* decision, found it significant that "[u]ntil today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Von Raab, supra,* at 680 (citation omitted).

In any event, in many of the cases that can be distinguished on the grounds suggested above and, more important, in *all* of the cases that cannot, see, *e. g., Skinner, supra* (blanket drug testing scheme); *Von Raab, supra* (same); cf. *Camara* v. *Municipal Court of City and County of San Francisco,* 387 U. S. 523 (1967) (area-wide searches of private residences), we upheld the suspicionless search only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented. In *Skinner,* for example, we stated outright that "'some quantum of individualized suspicion'" is "usually required" under the Fourth Amendment, *Skinner, supra,* at 624, quoting *Martinez-Fuerte, supra,* at 560, and we built the requirement into the test we announced: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion,* a search may be reasonable despite the absence of such suspicion," 489 U. S., at 624 (emphasis added). The obvious negative implication of this reasoning is that, if such an individualized suspicion requirement would *not* place the government's objectives in jeopardy, the requirement should not be forsaken. See also *Von Raab, supra,* at 665–666.

Accordingly, we upheld the suspicionless regime at issue in *Skinner* on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because "the scene of a serious rail accident is chaotic." *Skinner,* 489 U. S., at 631. (Of course, it could be plausibly argued that the fact that testing occurred only *after* train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use.) We have performed a similar inquiry in the other cases as well. See *Von Raab,* 489 U. S., at 674 (suspicion requirement for searches of customs officials for drug impairment impractical because "not feasible to subject [such] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments"); *Camara, supra,* at 537 (suspicion requirement for searches of homes for safety code violations impractical because conditions such as "faulty wiring" not observable from outside of house); see also *Wolfish,* 441 U. S., at 559–560, n. 40 (suspicion requirement for searches of prisoners for smuggling following contact visits impractical because observation necessary to gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford"); *Martinez-Fuerte,* 428 U. S., at 557 ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *United States* v. *Edwards,* 498 F. 2d 496, 500 (CA2 1974) (Friendly, J.) (suspicion-based searches of airport passengers' carry-on luggage impractical because of the great number of plane travelers and "conceded inapplicability" of the profile method of detecting hijackers).

Moreover, an individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people. See, *e. g., Camara, supra,* at 535 (even one safety code violation can cause "fires and epidemics [that] ravage large urban areas"); *Skinner, supra,* at 628 (even one drug- or alcohol-impaired train operator can lead to the "disastrous consequences" of a train wreck, such as "great human loss"); *Von Raab, supra,* at 670, 674, 677 (even one customs official caught up in drugs can, by virtue of impairment, susceptibility to bribes, or indifference, result in the noninterdiction of a "sizable drug shipmen[t]," which eventually injures the lives of thousands, or to a breach of "national security"); *Edwards, supra,* at 500 (even one hijacked airplane can destroy " 'hundreds of human lives and millions of dollars of property' ") (citation omitted).

B

The instant case stands in marked contrast. One searches today's majority opinion in vain for recognition that history and precedent establish that individualized suspicion is "usually required" under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual. See *supra,* at 674–675 and this page. Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability.

As an initial matter, I have serious doubts whether the Court is right that the District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. See *ante,* at 663–664. For one thing, there are significant safeguards against abuses. The fear that a suspicion-based regime will lead to the testing of "troublesome but not drug-likely" students, *ante,* at 663, for example, ignores that the required level of suspicion in the school context is objectively *reasonable* suspicion. In this respect, the facts of our decision in *New Jersey* v. *T. L. O.,* 469 U. S. 325 (1985), should be reassuring. There, we found reasonable suspicion to search a ninth-grade girl's purse for cigarettes after a teacher caught the girl smoking in the bathroom with a companion who admitted it. See *id.,* at 328, 345–346. Moreover, any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential.

For another thing, the District's concern for the adversarial nature of a suspicion-based regime (which appears to extend even to those who are *rightly* accused) seems to ignore the fact that such a regime would not exist in a vacuum. Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition. The District's own elaborate disciplinary scheme is reflected in its handbook, which, among other things, lists the following disciplinary "problem areas" carrying serious sanctions: "DEFIANCE OF AUTHORITY," "DISORDERLY OR DISRUPTIVE CONDUCT INCLUDING FOUL LANGUAGE," "AUTOMOBILE USE OR MISUSE," "FORGERY OR LYING," "GAMBLING," "THEFT," "TOBACCO," "MISCHIEF," "VANDALISM," "RECKLESSLY ENDANGERING," "MENACING OR HARASSMENT," "ASSAULT," "FIGHTING," "WEAPONS," "EXTORTION," "EXPLOSIVE DEVICES," and "ARSON." Record, Exh. 2, p. 11; see also *id.,* at 20–21 (listing rules regulating dress and grooming, public displays of affection, and the wearing of hats inside); cf. *id.,* at 8 ("RESPONSIBILITIES OF SCHOOLS" include "To develop and distribute to parents and students reasonable rules and regulations governing student behavior and attendance" and "To provide fair and reasonable standards of conduct and to enforce those standards through appropriate disciplinary action"). The high number of disciplinary referrals in the record in this case illustrates the District's robust scheme in action.

In addition to overstating its concerns with a suspicion-based program, the District seems to have *understated* the extent to which such a program is less intrusive of students' privacy. By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is *significantly* less intrusive.

In any event, whether the Court is right that the District reasonably weighed the lesser intrusion of a suspicion-based scheme against its policy concerns is beside the point. As stated, a suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

But having misconstrued the fundamental role of the individualized suspicion requirement in Fourth Amendment analysis, the Court never seriously engages the practicality of such a requirement in the instant case. And that failure is crucial because nowhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. See *T. L. O.*, 469 U. S., at 339 ("[A] proper educational environment requires close supervision of schoolchildren").

The record here indicates that the Vernonia schools are no exception. The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T. L. O.* decision. See *id.*, at 340–342 (warrant and probable cause not required for school searches; reasonable suspicion sufficient). Small groups of students, for example, were observed by a teacher "passing joints back and forth" across the street at a restaurant before school and during school hours. Tr. 67 (Apr. 29, 1992). Another group was caught skipping school and using drugs at one of the students' houses. See *id.*, at 93–94. Several students actually *admitted* their drug use to school officials (some of them being caught with marijuana pipes). See *id.*, at 24. One student presented himself to his teacher as "clearly obviously inebriated" and had to be sent home. *Id.*, at 68. Still another was observed dancing and singing at the top of his voice in the back of the classroom; when the teacher asked what was going on, he replied, "Well, I'm just high on life." *Id.*, at 89–90. To take a final example, on a certain road trip, the school wrestling coach smelled marijuana smoke in a motel room occupied by four wrestlers, see *id.*, at 110–112, an observation that (after some questioning) would probably have given him reasonable suspicion to test one or all of them. Cf. 4 LaFave § 10.11(b), at 169 ("[I]n most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test").

In light of all this evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion-based testing (for which the District appears already to have rules in place, see Record, Exh. 2, at 14, 17) would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of James Acton and others like him. And were there any doubt about such a conclusion, it is removed by indications in the record that suspicion-based testing could have been supplemented by an equally vigorous campaign to have Vernonia's parents encourage their children to submit to the District's *voluntary* drug testing program. See *id.*, at 32 (describing the voluntary program); *ante*, at 665 (noting widespread parental support for drug testing). In these circumstances, the Fourth Amendment dictates that a mass, suspicionless search regime is categorically unreasonable.

I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be *as* effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. *Arizona* v. *Hicks*, 480 U. S. 321, 329 (1987). Indeed, the price we pay is higher in the criminal context, given that police do not closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

The principal counterargument to all this, central to the Court's opinion, is that the Fourth Amendment is more lenient with respect to school searches. That is no doubt correct, for, as the Court explains, *ante*, at 655–656, schools have traditionally had special guardianlike responsibilities for children that necessitate a degree of constitutional leeway. This principle explains the considerable Fourth Amendment leeway we gave school officials in *T. L. O.* In that case, we held that children at school do not enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement and the probable cause requirement. See *T. L. O.*, 469 U. S., at 337–343. And this was true even though the same children enjoy such protections "in a nonschool setting." *Id.*, at 348 (Powell, J., concurring).

The instant case, however, asks whether the Fourth Amendment is even more lenient than that, *i. e.*, whether it is *so* lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people. It is not at all clear that people in *prison* lack this categorical protection, see *Wolfish*, 441 U. S., at 558–560 (upholding certain suspicionless searches of prison inmates); but cf. *supra*, at 675 (indicating why suspicion requirement was impractical in *Wolfish*), and we have said "[w]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T. L. O.*, *supra*, at 338–339. Thus, if we are to mean what we often proclaim—that students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969)—the answer must plainly be no.[1]

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[1] The Court says I pay short shrift to the original meaning of the Fourth Amendment as it relates to searches of public school children. See *ante*, at 665, n. 4. As an initial matter, the historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time, see *ante*, at 652, n. 1), are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of the framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now. At the time of the framing, for example, the fact that a child's parents refused to authorize a private schoolmaster's search of the child would probably have rendered any such search unlawful; after

For the contrary position, the Court relies on cases such as *T. L. O., Ingraham* v. *Wright,* 430 U. S. 651 (1977), and *Goss* v. *Lopez,* 419 U. S. 565 (1975). See *ante,* at 655–656. But I find the Court's reliance on these cases ironic. If anything, they affirm that schools have substantial constitutional leeway in carrying out their traditional mission of responding to *particularized* wrongdoing. See *T. L. O., supra* (leeway in investigating particularized wrongdoing); *Ingraham, supra* (leeway in punishing particularized wrongdoing); *Goss, supra* (leeway in choosing procedures by which particularized wrongdoing is punished).

By contrast, intrusive, blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise. As James Acton's father said on the witness stand, "[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . , and I think that kind of sets a bad tone for citizenship." Tr. 9 (Apr. 29, 1992).

I find unpersuasive the Court's reliance, *ante,* at 656–657, on the widespread practice of physical examinations and vaccinations, which are both blanket searches of a sort. Of course, for these practices to have *any* Fourth Amendment significance, the Court has to assume that these physical exams and vaccinations are typically "required" to a similar extent that urine testing and collection is required in the instant case, *i. e.,* that they are required regardless of parental

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all, at common law, the source of the schoolmaster's authority over a child was a delegation of the parent's authority. See *ante,* at 654–655. Today, of course, the fact that a child's parents refuse to authorize a public school search of the child—as James Acton's parents refused here—is of little constitutional moment. Cf. *Ingraham* v. *Wright,* 430 U. S. 651, 662, n. 22 (1977) ("[P]arental approval of corporal punishment is not constitutionally required").

objection and that some meaningful sanction attaches to the failure to submit. In any event, without forming any particular view of such searches, it is worth noting that a suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches *for anything in particular* and so there is nothing about which to be suspicious. Nor is this saying anything new; it is the same theory on which, in part, we have repeatedly upheld certain inventory searches. See, *e. g., South Dakota* v. *Opperman*, 428 U. S. 364, 370, n. 5 (1976) ("The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions"). As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does. See *supra*, at 679–680.

It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenges to such searches. By contrast, although I agree with the Court that the accusatory nature of the District's testing program is *diluted* by making it a blanket one, any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective, the motives for the program notwithstanding; and for the same reason, the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment. The best proof that the District's testing program is to *some* extent accusatory can be found in James Acton's own explanation on the witness stand as to why he did not want to submit to drug testing: "Because I feel that they have no reason to think I was taking drugs." Tr. 13 (Apr. 29, 1992). It is hard to think of a manner of explanation that resonates more intensely in our Fourth Amendment tradition than this.

II

I do not believe that suspicionless drug testing is justified on these facts. But even if I agreed that some such testing were reasonable here, I see two other Fourth Amendment flaws in the District's program.[2] First, and most serious, there is virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the seventh and eighth grades, and which Acton attended when this litigation began. This is not surprising, given that, of the four witnesses who testified to drug-related incidents, three were teachers and/or coaches at the high school, see Tr. 65; *id.*, at 86; *id.*, at 99, and the fourth, though the principal of the grade school at the time of the litigation, had been employed as principal of the high school during the years leading up to (and beyond) the implementation of the drug testing policy. See *id.*, at 17. The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had in '88 and '89 didn't start at the high school level. They started in the elementary school." *Id.*, at 43. But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student athletes—in Vernonia and, by the Court's reasoning, in other school districts as well. Perhaps there is a drug problem at the grade school, but one would not know it from this record. At the least, then, I would insist that the parties and the District Court address this issue on remand.

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[2] Because I agree with the Court that we may assume the District's program allows students to confine the advanced disclosure of highly personal prescription medications to the testing lab, see *ante*, at 660, I also agree that *Skinner* controls this aspect of the case, and so do not count the disclosure requirement among the program's flaws.

Second, even as to the high school, I find unreasonable the school's choice of student athletes as the class to subject to suspicionless testing—a choice that appears to have been driven more by a belief in what would pass constitutional muster, see *id.*, at 45–47 (indicating that the original program was targeted at students involved in any extracurricular activity), than by a belief in what was required to meet the District's principal disciplinary concern. Reading the full record in this case, as well as the District Court's authoritative summary of it, 796 F. Supp. 1354, 1356–1357 (Ore. 1992), it seems quite obvious that the true driving force behind the District's adoption of its drug testing program was the need to combat the rise in drug-related disorder and disruption in its classrooms and around campus. I mean no criticism of the strength of that interest. On the contrary, where the record demonstrates the existence of such a problem, that interest seems self-evidently compelling. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *T. L. O.*, 469 U. S., at 350 (Powell, J., concurring). And the record in this case surely demonstrates there was a drug-related discipline problem in Vernonia of "'epidemic proportions.'" 796 F. Supp., at 1357. The evidence of a drug-related sports injury problem at Vernonia, by contrast, was considerably weaker.

On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, see Record, Exh. 2, at 9, 11—disruption that had a strong nexus to drug use, as the District established at trial. Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, over the likelihood that they would be tested. Moreover, there would be a reduced concern for the accusatory nature of the search, because the Court's feared "badge of shame," *ante*, at 663, would already exist, due to the antecedent accusation and finding of severe disruption. In a lesser known aspect of *Skinner*, we upheld an analogous testing scheme with little hesitation. See *Skinner*, 489 U. S., at 611 (describing " 'Authorization to Test for Cause' " scheme, according to which train operators would be tested "in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding").

III

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.

BABBITT, SECRETARY OF INTERIOR, ET AL. *v.* SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94–859. Argued April 17, 1995—Decided June 29, 1995

As relevant here, the Endangered Species Act of 1973 (ESA or Act) makes it unlawful for any person to "take" endangered or threatened species, § 9(a)(1)(B), and defines "take" to mean to "harass, harm, pursue," "wound," or "kill," § 3(19). In 50 CFR § 17.3, petitioner Secretary of the Interior further defines "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." Respondents, persons and entities dependent on the forest products industries and others, challenged this regulation on its face, claiming that Congress did not intend the word "take" to include habitat modification. The District Court granted petitioners summary judgment, but the Court of Appeals ultimately reversed. Invoking the *noscitur a sociis* canon of statutory construction, which holds that a word is known by the company it keeps, the court concluded that "harm," like the other words in the definition of "take," should be read as applying only to the perpetrator's direct application of force against the animal taken.

Held: The Secretary reasonably construed Congress' intent when he defined "harm" to include habitat modification. Pp. 696–708.

(a) The Act provides three reasons for preferring the Secretary's interpretation. First, the ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species. Unless "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate that of other words that § 3 uses to define "take." Second, the ESA's broad purpose of providing comprehensive protection for endangered and threatened species supports the reasonableness of the Secretary's definition. Respondents advance strong arguments that activities causing minimal or unforeseeable harm will not violate the Act as construed in the regulation, but their facial challenge would require that the Secretary's understanding of harm be invalidated in every circumstance. Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity," § 10(a)(1)(B), strongly suggests that Congress understood § 9 to prohibit indirect as well as deliberate takings. No one could seriously request an "incidental" take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species. Pp. 696–701.

(b) The Court of Appeals made three errors in finding that "harm" must refer to a direct application of force because the words around it do. First, the court's premise was flawed. Several of the words accompanying "harm" in § 3's definition of "take" refer to actions or effects that do not require direct applications of force. Second, to the extent that it read an intent or purpose requirement into the definition of "take," it ignored § 9's express provision that a "knowing" action is enough to violate the Act. Third, the court employed *noscitur a sociis* to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning. Pp. 701–702.

(c) The Act's inclusion of land acquisition authority, § 5, and a directive to federal agencies to avoid destruction or adverse modification of critical habitat, § 7, does not alter the conclusion reached in this case. Respondents' argument that the Government lacks any incentive to purchase land under § 5 when it can simply prohibit takings under § 9 ignores the practical considerations that purchasing habitat lands may be less expensive than pursuing criminal or civil penalties and that § 5 allows for protection of habitat before any endangered animal has been harmed, whereas § 9 cannot be enforced until a killing or injury has occurred. Section 7's directive applies only to the Federal Government, whereas § 9 applies to "any person." Pp. 702–704.

(d) The conclusion reached here gains further support from the statute's legislative history. Pp. 704–708.

17 F. 3d 1463, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 708. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 714.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Days, Assistant Attorney General Schiffer, Beth S. Brinkmann, Martin W. Matzen, Ellen J. Durkee*, and *Jean E. Williams.*

John A. Macleod argued the cause for respondents. With him on the brief were *Steven P. Quarles, Clifton S. Elgarten, Thomas R. Lundquist,* and *William R. Murray.**

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*Briefs of *amici curiae* urging reversal were filed for the Environmental Law Committee of the Association of the Bar of the City of New York by *Brent L. Brandenburg;* for Friends of Animals, Inc., by *Herman Kaufman;* for the National Wildlife Federation et al. by *Patti A. Goldman* and *Todd D. True;* and for Scientist John Cairns, Jr., et al. by *Wm. Robert Irvin, Timothy Eichenberg,* and *Patrick A. Parenteau.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona ex rel. M. J. Hassel, Arizona State Land Commissioner, et al. by *Grant Woods,* Attorney General of Arizona, *Mary Mangotich Grier,* Assistant Attorney General, and *Gale A. Norton,* Attorney General of Colorado; for the State of California et al. by *Daniel Lungren,* Attorney General of California, *Roderick E. Walston,* Chief Assistant Attorney General, *Charles W. Getz IV,* Assistant Attorney General, and *Linus Masouredis,* Deputy Attorney General, and for the Attorneys General for their respective States as follows: *Carla J. Stovall* of Kansas, *Don Stenberg* of Nebraska, and *Jan Graham* of Utah; for the State of Texas by *Dan Morales,* Attorney General, *Jorge Vega,* First Assistant Attorney General, *Javier Aguilar* and *Sam Goodhope,* Special Assistant Attorneys General, and *Paul Terrill* and *Eugene Montes,* Assistant Attorneys General; for the American Farm Bureau Federation et al. by *Timothy S. Bishop, Michael F. Rosenblum, John J. Rademacher, Richard L. Krause, Nancy N. McDonough, Carolyn S. Richardson, Douglas G. Caroom,* and *Sydney W. Falk, Jr.;* for Anderson & Middleton Logging Co., Inc., by *Mark C. Rutzick* and *J. J. Leary, Jr.;* for Cargill, Inc., by *Louis F. Claiborne, Edgar B. Washburn,* and *David Ivester;* for the Chamber of Commerce of the United States of America et al. by *Virginia S. Albrecht, Robin S. Conrad, Ted R. Brown,* and *Ralph W. Holmen;* for the Competitive Enterprise Institute by *Sam Kazman;* for the Davis Mountains Trans-Pecos Heritage Association et al. by *Nancie G. Marzulla;* for the Florida Legal Foundation et al. by *Michael L. Rosen* and *G. Stephen Parker;* for the Institute for Justice by *Richard A. Epstein, William H. Mellor III,* and *Clint Bolick;* for the National Association of Home Builders et al. by *D. Barton Doyle;* for the National Cattlemen's Association et al. by *Roger J. Marzulla, Michael T. Lempres,* and *William G. Myers III;* for the Mountain States Legal Foundation et al. by *William Perry Pendley;* for the Pacific Legal Foundation et al. by *Robin L. Rivett;* for the State Water Contractors et al. by *Gregory K. Wilkinson, Eric L. Garner, Thomas*

JUSTICE STEVENS delivered the opinion of the Court.

The Endangered Species Act of 1973 (ESA or Act), 87 Stat. 884, 16 U. S. C. § 1531 (1988 ed. and Supp. V), contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

I

Section 9(a)(1) of the Act provides the following protection for endangered species:[1]

> "Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
>
> . . . . .

W. Birmingham, and *Stuart L. Somach;* for the Washington Legal Foundation et al. by *Albert Gidari, Daniel J. Popeo*, and *Paul D. Kamenar;* and for Congressman Bill Baker et al. by *Virginia S. Albrecht.*

Briefs of *amici curiae* were filed for the Nationwide Public Projects Coalition et al. by *Lawrence R. Liebesman, Kenneth S. Kamlet*, and *Duane J. Desiderio;* and for the Navajo Nation et al. by *Scott B. McElroy, Lester K. Taylor, Daniel H. Israel*, and *Stanley Pollack.*

[1] The Act defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U. S. C. § 1532(6).

> "(B) take any such species within the United States or the territorial sea of the United States." 16 U. S. C. § 1538(a)(1).

Section 3(19) of the Act defines the statutory term "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U. S. C. § 1532(19).

The Act does not further define the terms it uses to define "take." The Interior Department regulations that implement the statute, however, define the statutory term "harm":

> "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

This regulation has been in place since 1975.[2]

A limitation on the § 9 "take" prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. § 1539(a)(1)(B).

In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4, 16 U. S. C. § 1533, commands the Secretary to identify species of fish or wildlife that are in danger of extinction and to publish from time to time lists of all species he determines to be endangered or threatened. Section 5, 16 U. S. C. § 1534, authorizes the Secretary, in cooperation with the States, see § 1535, to acquire land to aid in preserving such species. Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U. S. C. § 1536(a)(2).

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[2] The Secretary, through the Director of the Fish and Wildlife Service, originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation. See 40 Fed. Reg. 44412, 44416 (1975); 46 Fed. Reg. 54748, 54750 (1981).

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action against petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, in the United States District Court for the District of Columbia to challenge the statutory validity of the Secretary's regulation defining "harm," particularly the inclusion of habitat modification and degradation in the definition.[3] Respondents challenged the regulation on its face. Their complaint alleged that application of the "harm" regulation to the red-cockaded woodpecker, an endangered species,[4] and the northern spotted owl, a threatened species,[5] had injured them economically. App. 17–23.

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[3] Respondents also argued in the District Court that the Secretary's definition of "harm" is unconstitutionally void for vagueness, but they do not press that argument here.

[4] The woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the ESA. See 50 CFR § 17.11(h) (1994), issued pursuant to the Endangered Species Conservation Act of 1969, 83 Stat. 275.

[5] See 55 Fed. Reg. 26114 (1990). Another regulation promulgated by the Secretary extends to threatened species, defined in the ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U. S. C. § 1532(20), some but not all of the protections endangered species enjoy. See 50 CFR § 17.31(a) (1994). In the District Court respondents

Respondents advanced three arguments to support their submission that Congress did not intend the word "take" in § 9 to include habitat modification, as the Secretary's "harm" regulation provides. First, they correctly noted that language in the Senate's original version of the ESA would have defined "take" to include "destruction, modification, or curtailment of [the] habitat or range" of fish or wildlife,[6] but the Senate deleted that language from the bill before enacting it. Second, respondents argued that Congress intended the Act's express authorization for the Federal Government to buy private land in order to prevent habitat degradation in § 5 to be the exclusive check against habitat modification on private property. Third, because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, respondents argued that the court should not interpret the term so expansively as to include habitat modification.

The District Court considered and rejected each of respondents' arguments, finding "that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." 806 F. Supp. 279, 285 (1992). The court noted that in 1982, when Congress was aware of a judicial decision that had applied the Secretary's regulation, see *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495 (CA9 1981) *(Palila I)*, it amended the Act without using the opportunity to change the definition of "take." 806 F. Supp., at 284. The court stated that, even had it found the ESA "'silent or ambiguous'" as to the authority for the Secretary's definition of "harm," it would nevertheless have upheld the regulation as a reasonable interpretation of the statute. *Id.*, at 285 (quot-

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unsuccessfully challenged that regulation's extension of § 9 to threatened species, but they do not press the challenge here.

[6] Senate 1983, reprinted in Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., 27 (1973).

ing *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984)). The District Court therefore entered summary judgment for petitioners and dismissed respondents' complaint.

A divided panel of the Court of Appeals initially affirmed the judgment of the District Court. 1 F. 3d 1 (CADC 1993). After granting a petition for rehearing, however, the panel reversed. 17 F. 3d 1463 (CADC 1994). Although acknowledging that "[t]he potential breadth of the word 'harm' is indisputable," *id.*, at 1464, the majority concluded that the immediate statutory context in which "harm" appeared counseled against a broad reading; like the other words in the definition of "take," the word "harm" should be read as applying only to "the perpetrator's direct application of force against the animal taken . . . . The forbidden acts fit, in ordinary language, the basic model 'A hit B.'" *Id.*, at 1465. The majority based its reasoning on a canon of statutory construction called *noscitur a sociis*, which holds that a word is known by the company it keeps. See *Neal* v. *Clark*, 95 U. S. 704, 708–709 (1878).

The majority claimed support for its construction from a decision of the Ninth Circuit that narrowly construed the word "harass" in the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1372(a)(2)(A), see *United States* v. *Hayashi*, 5 F. 3d 1278, 1282 (1993); from the legislative history of the ESA;[7] from its view that Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted; and from the ESA's land acquisition provision in § 5 and restriction on federal agencies' activities regarding habitat in § 7, both of which the court saw as evidence that Congress had not intended the § 9 "take" prohibition to reach habitat modification. Most prominently, the court performed a lengthy analysis of the 1982 amendment to § 10 that provided for "incidental take permits" and concluded that the amendment did not change the meaning of the term "take" as defined in the 1973 statute.[8]

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[7] Judge Sentelle filed a partial concurrence in which he declined to join the portions of the court's opinion that relied on legislative history. See 17 F. 3d 1463, 1472 (CADC 1994).

Chief Judge Mikva, who had announced the panel's original decision, dissented. See 17 F. 3d, at 1473. In his view, a proper application of *Chevron* indicated that the Secretary had reasonably defined "harm," because respondents had failed to show that Congress unambiguously manifested its intent to exclude habitat modification from the ambit of "take." Chief Judge Mikva found the majority's reliance on *noscitur a sociis* inappropriate in light of the statutory language and unnecessary in light of the strong support in the legislative history for the Secretary's interpretation. He did not find the 1982 "incidental take permit" amendment alone sufficient to vindicate the Secretary's definition of "harm," but he believed the amendment provided additional support for that definition because it reflected Congress' view in 1982 that the definition was reasonable.

The Court of Appeals' decision created a square conflict with a 1988 decision of the Ninth Circuit that had upheld the Secretary's definition of "harm." See *Palila* v. *Hawaii Dept. of Land and Natural Resources,* 852 F. 2d 1106 (1988) *(Palila II).* The Court of Appeals neither cited nor distinguished *Palila II,* despite the stark contrast between the Ninth Circuit's holding and its own. We granted certiorari to resolve the conflict. 513 U. S. 1072 (1995). Our consideration of the text and structure of the Act, its legislative history, and the significance of the 1982 amendment persuades us that the Court of Appeals' judgment should be reversed.

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[8] The 1982 amendment had formed the basis on which the author of the majority's opinion on rehearing originally voted to affirm the judgment of the District Court. Compare 1 F. 3d 1, 11 (CADC 1993) (Williams, J., concurring in part), with 17 F. 3d, at 1467–1472.

II

Because this case was decided on motions for summary judgment, we may appropriately make certain factual assumptions in order to frame the legal issue. First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume, *arguendo*, that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured. Under respondents' view of the law, the Secretary's only means of forestalling that grave result—even when the actor knows it is certain to occur[9]—is to use his § 5 authority to purchase the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the § 9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10.

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[9] As discussed above, the Secretary's definition of "harm" is limited to "act[s] which actually kil[l] or injur[e] wildlife." 50 CFR § 17.3 (1994). In addition, in order to be subject to the Act's criminal penalties or the more severe of its civil penalties, one must "knowingly violat[e]" the Act or its implementing regulations. 16 U. S. C. §§ 1540(a)(1), (b)(1). Congress added "knowingly" in place of "willfully" in 1978 to make "criminal violations of the act a general rather than a specific intent crime." H. R. Conf. Rep. No. 95–1804, p. 26 (1978). The Act does authorize up to a $500 civil fine for "[a]ny person who otherwise violates" the Act or its implementing regulations. 16 U. S. C. § 1540(a)(1). That provision is potentially sweeping, but it would be so with or without the Secretary's "harm" regulation, making it unhelpful in assessing the reasonableness of the regulation. We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter, see, *e. g.*, *Staples* v. *United States*, 511 U. S. 600 (1994), but the proper case in which we might consider whether to do so in the § 9 provision for a $500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term. We do not agree with the dissent that the regulation covers results that are not "even foreseeable . . . no matter how long the chain of causality between modification and injury." *Post*, at 715. Respondents have suggested no reason why either the "knowingly violates" or the "otherwise violates" provision of the statute—or the "harm" regulation itself—should not be

The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm."[10] Moreover, unless the statutory term "harm" en-

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read to incorporate ordinary requirements of proximate causation and foreseeability. In any event, neither respondents nor their *amici* have suggested that the Secretary employs the "otherwise violates" provision with any frequency.

[10] Respondents and the dissent emphasize what they portray as the "established meaning" of "take" in the sense of a "wildlife take," a meaning respondents argue extends only to "the effort to exercise dominion over some creature, and the concrete effect of *[sic]* that creature." Brief for Respondents 19; see *post*, at 717-718. This limitation ill serves the statutory text, which forbids not taking "some creature" but "tak[ing] any [endangered] *species*"—a formidable task for even the most rapacious feudal lord. More importantly, Congress explicitly defined the operative term "take" in the ESA, no matter how much the dissent wishes otherwise, see *post*, at 717–720, 722–723, thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term "harm." Finally, Congress' definition of "take" includes several words—

compasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that §3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation. See, *e. g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837, and n. 11 (1988).[11]

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA* v. *Hill*, 437 U. S. 153 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.*, at 180. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, see *id.*, at 175, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in §2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." 16 U. S. C. §1531(b).

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most obviously "harass," "pursue," and "wound," in addition to "harm" itself—that fit respondents' and the dissent's definition of "take" no better than does "significant habitat modification or degradation."

[11] In contrast, if the statutory term "harm" encompasses such indirect means of killing and injuring wildlife as habitat modification, the other terms listed in §3—"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect"—generally retain independent meanings. Most of those terms refer to deliberate actions more frequently than does "harm," and they therefore do not duplicate the sense of indirect causation that "harm" adds to the statute. In addition, most of the other words in the definition describe either actions from which habitat modification does not usually result (*e. g.*, "pursue," "harass") or effects to which activities that modify habitat do not usually lead (*e. g.*, "trap," "collect"). To the extent the Secretary's definition of "harm" may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act. See *infra* this page and 699–700.

In *Hill,* we construed § 7 as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. See 437 U. S., at 193. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.,* at 184. Although the § 9 "take" prohibition was not at issue in *Hill,* we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm."[12] In light of that provision for habitat protection, we could "not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." *Id.,* at 184, n. 30. Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.

Respondents advance strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the "harm" regulation. Respondents, however, present a facial challenge to the regulation. Cf. *Anderson* v. *Edwards,* 514 U. S. 143, 155–156, n. 6 (1995); *INS* v. *National Center for Immigrants' Rights, Inc.,* 502 U. S. 183, 188 (1991). Thus, they ask us to invalidate the Secretary's understanding of "harm" in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable.[13]

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[12] We stated: "The Secretary of the Interior has defined the term 'harm' to mean 'an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of "harm."*' " *TVA* v. *Hill,* 437 U. S., at 184–185, n. 30 (citations omitted; emphasis in original).

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U. S. C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974). The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U. S. C. § 1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental effects on listed species.[14] No one could seriously request an "incidental" take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read "harm" so narrowly that the permit procedure would have little more than that absurd purpose. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U. S. 386, 397 (1995). Congress' addition of the § 10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

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[13] The dissent incorrectly asserts that the Secretary's regulation (1) "dispenses with the foreseeability of harm" and (2) "fail[s] to require injury to particular animals," *post*, at 731. As to the first assertion, the regulation merely implements the statute, and it is therefore subject to the statute's "knowingly violates" language, see 16 U. S. C. §§ 1540(a)(1), (b)(1), and ordinary requirements of proximate causation and foreseeability. See n. 9, *supra*. Nothing in the regulation purports to weaken those requirements. To the contrary, the word "actually" in the regulation should be construed to limit the liability about which the dissent appears most concerned, liability under the statute's "otherwise violates" provision. See n. 9, *supra; post*, at 721–722, 732–733. The Secretary did not need to include "actually" to connote "but for" causation, which the other words in the definition obviously require. As to the dissent's second assertion, every term in the regulation's definition of "harm" is subservient to the phrase "an act which actually kills or injures wildlife."

[14] The dissent acknowledges the legislative history's clear indication that the drafters of the 1982 amendment had habitat modification in mind, see *post*, at 730, but argues that the text of the amendment requires a contrary conclusion. This argument overlooks the statute's requirement of a "con-

The Court of Appeals made three errors in asserting that "harm" must refer to a direct application of force because the words around it do.[15] First, the court's premise was flawed. Several of the words that accompany "harm" in the § 3 definition of "take," especially "harass," "pursue," "wound," and "kill," refer to actions or effects that do not require direct applications of force. Second, to the extent the court read a requirement of intent or purpose into the words used to define "take," it ignored § 11's express provision that a "know-

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servation plan," which must describe an alternative to a known, but undesired, habitat modification.

[15] The dissent makes no effort to defend the Court of Appeals' reading of the statutory definition as requiring a direct application of force. Instead, it tries to impose on § 9 a limitation of liability to "affirmative conduct intentionally directed against a particular animal or animals." *Post*, at 720. Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 10(a)(1)(B); unless the developer was motivated by a desire "to get at a turtle," *post*, at 721, no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words "kill" and "harm" in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals' interpretation apply as well to the dissent's novel construction.

in[g]" action is enough to violate the Act. Third, the court employed *noscitur a sociis* to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning. The canon, to the contrary, counsels that a word "gathers meaning from the words around it." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modification permissibly interprets "harm" to have "a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923).[16]

Nor does the Act's inclusion of the § 5 land acquisition authority and the § 7 directive to federal agencies to avoid destruction or adverse modification of critical habitat alter our conclusion. Respondents' argument that the Government lacks any incentive to purchase land under § 5 when it can simply prohibit takings under § 9 ignores the practical considerations that attend enforcement of the ESA. Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the § 5 procedure allows for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured. The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species. The § 7 directive applies only to the Federal Government, whereas the § 9 prohibition applies to "any person." Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9 does not replicate, and § 7 does not limit its admonition to habitat modification that "actually kills or injures wildlife." Conversely, § 7 contains limitations that § 9 does not, applying only to actions "likely to jeopardize the continued existence of any endangered species or threatened species," 16 U. S. C. § 1536(a)(2), and to modifications of habitat that has been designated "critical" pursuant to § 4, 16 U. S. C. § 1533(b)(2).[17] Any overlap that § 5 or § 7 may have with § 9 in particular cases is unexceptional, see, *e. g., Russello* v. *United States,* 464 U. S. 16, 24, and n. 2 (1983), and simply reflects the broad purpose of the Act set out in § 2 and acknowledged in *TVA* v. *Hill.*

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[16] Respondents' reliance on *United States* v. *Hayashi*, 22 F. 3d 859 (CA9 1993), is also misplaced. *Hayashi* construed the term "harass," part of the definition of "take" in the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1361 *et seq.*, as requiring a "direct intrusion" on wildlife to support a criminal prosecution. 22 F. 3d, at 864. *Hayashi* dealt with a challenge to a single application of a statute whose "take" definition includes neither "harm" nor several of the other words that appear in the ESA definition. Moreover, *Hayashi* was decided by a panel of the Ninth Circuit, the same court that had previously upheld the regulation at issue here in *Palila II*, 852 F. 2d 1106 (1988). Neither the *Hayashi* majority nor the dissent saw any need to distinguish or even to cite *Palila II*.

We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. See generally *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation. See

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[17] Congress recognized that §§ 7 and 9 are not coextensive as to federal agencies when, in the wake of our decision in *Hill* in 1978, it added § 7*(o),* 16 U. S. C. § 1536*(o),* to the Act. That section provides that any federal project subject to exemption from § 7, 16 U. S. C. § 1536(h), will also be exempt from § 9.

Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986).[18]

III

Our conclusion that the Secretary's definition of "harm" rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of "harm," but they make clear that Congress intended "take" to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93–307, p. 7 (1973). The House Report stated that "the broadest possible terms" were used to define restrictions on takings. H. R. Rep. No. 93–412, p. 15 (1973). The House Report underscored the breadth of the

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[18] Respondents also argue that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties. The rule of lenity is premised on two ideas: First, "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'"; second, "legislatures and not courts should define criminal activity." *United States* v. *Bass,* 404 U. S. 336, 347–350 (1971) (quoting *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931)). We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles—where no regulation was present. See *United States* v. *Thompson/Center Arms Co.,* 504 U. S. 505, 517–518, and n. 9 (1992). We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

"take" definition by noting that it included "harassment, *whether intentional or not.*" *Id.*, at 11 (emphasis added). The Report explained that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Ibid.* These comments, ignored in the dissent's welcome but selective foray into legislative history, see *post*, at 726–729, support the Secretary's interpretation that the term "take" in § 9 reached far more than the deliberate actions of hunters and trappers.

Two endangered species bills, S. 1592 and S. 1983, were introduced in the Senate and referred to the Commerce Committee. Neither bill included the word "harm" in its definition of "take," although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted. See Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., pp. 7, 27 (1973) (hereinafter Hearings). Senator Tunney, the floor manager of the bill in the Senate, subsequently introduced a floor amendment that added "harm" to the definition, noting that this and accompanying amendments would "help to achieve the purposes of the bill." 119 Cong. Rec. 25683 (1973). Respondents argue that the lack of debate about the amendment that added "harm" counsels in favor of a narrow interpretation. We disagree. An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.

The definition of "take" that originally appeared in S. 1983 differed from the definition as ultimately enacted in one other significant respect: It included "the destruction, modification, or curtailment of [the] habitat or range" of fish and wildlife. Hearings, at 27. Respondents make much of the fact that the Commerce Committee removed this phrase from the "take" definition before S. 1983 went to the floor. See 119 Cong. Rec. 25663 (1973). We do not find that fact especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today. Most notably, the habitat protection provision in S. 1983 would have applied far more broadly than the regulation does because it made adverse habitat modification a categorical violation of the "take" prohibition, unbounded by the regulation's limitation to habitat modifications that actually kill or injure wildlife. The S. 1983 language also failed to qualify "modification" with the regulation's limiting adjective "significant." We do not believe the Senate's unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary's "harm" regulation.[19]

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[19] Respondents place heavy reliance for their argument that Congress intended the § 5 land acquisition provision and not § 9 to be the ESA's remedy for habitat modification on a floor statement by Senator Tunney:

"Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973).

Similarly, respondents emphasize a floor statement by Representative Sullivan, the House floor manager for the ESA:

"For the most part, the principal threat to animals stems from destruction of their habitat. . . . H. R. 37 will meet this problem by providing

The history of the 1982 amendment that gave the Secretary authority to grant permits for "incidental" takings provides further support for his reading of the Act. The House Report expressly states that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H. R. Rep. No. 97–567, p. 31 (1982). This reference to the foreseeability of incidental takings undermines respondents' argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: Both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. See S. Rep. No. 97–418, p. 10 (1982); H. R. Conf. Rep. No. 97–835, pp. 30–32 (1982). Thus, Congress in 1982 focused squarely on the aspect of the "harm" regulation at issue in this litigation. Congress' implementation of a permit pro-

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funds for acquisition of critical habitat . . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

"Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.*, at 30162.

Each of these statements merely explained features of the bills that Congress eventually enacted in § 5 of the ESA and went on to discuss elements enacted in § 9. Neither statement even suggested that § 5 would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of § 9. Respondents' suggestion that these statements identified § 5 as the ESA's only response to habitat modification contradicts their emphasis elsewhere on the habitat protections in § 7. See *supra*, at 702–703.

gram is consistent with the Secretary's interpretation of the term "harm."

IV

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. See 16 U. S. C. §§ 1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. See *Chevron*, 467 U. S., at 865–866. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

My agreement with the Court is founded on two understandings. First, the challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals. Second, even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability. These limitations, in my view, call into question *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F. 2d 1106 (CA9 1988) *(Palila II)*, and with it, many of the applications derided by the dissent. Because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply, I join the opinion of the Court.

In my view, the regulation is limited by its terms to actions that actually kill or injure individual animals. JUSTICE SCALIA disagrees, arguing that the harm regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." *Post*, at 716. At one level, I could not reasonably quarrel with this observation; death to an individual animal always reduces the size of the population in which it lives, and in that sense, "injures" that population. But by its insight, the dissent means something else. Building upon the regulation's use of the word "breeding," JUSTICE SCALIA suggests that the regulation facially bars significant habitat modification that actually kills or injures *hypothetical* animals (or, perhaps more aptly, causes potential additions to the population not to come into being). Because "[i]mpairment of breeding does not 'injure' living creatures," JUSTICE SCALIA reasons, the regulation *must* contemplate application to "*a population* of animals which would otherwise have maintained or increased its numbers." *Post*, at 716, 734.

I disagree. As an initial matter, I do not find it as easy as JUSTICE SCALIA does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To "injure" is, among other things, "to impair." Webster's Ninth New Collegiate Dictionary 623 (1983). One need not subscribe to theories of "psychic harm," cf. *post,* at 734–735, n. 5, to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury.

In any event, even if impairing an animal's ability to breed were not, *in and of itself,* an injury to that animal, interference with breeding can cause an animal to suffer other, perhaps more obvious, kinds of injury. The regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation. In contrast to JUSTICE SCALIA, I do not read the regulation's "breeding" reference to vitiate or somehow to qualify the clear actual death or injury requirement, or to suggest that the regulation contemplates extension to nonexistent animals.

There is no inconsistency, I should add, between this interpretation and the commentary that accompanied the amendment of the regulation to include the actual death or injury requirement. See 46 Fed. Reg. 54748 (1981). Quite the contrary. It is true, as JUSTICE SCALIA observes, *post,* at 716, that the Fish and Wildlife Service states at one point that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," see 46 Fed. Reg. 54748 (1981). But one could just as easily emphasize the word "direct" in this sentence as the word "individual."* Elsewhere in the commentary, the Service makes clear that "section 9's threshold does focus on individual members of a protected species." *Id.*, at 54749. Moreover, the Service says that the regulation has no application to speculative harm, explaining that its insertion of the word "actually" was intended "to bulwark the need for proven injury to a species due to a party's actions." *Ibid.;* see also *ibid.* (approving language that "[h]arm covers actions . . . which actually (as opposed to potentially), cause injury"). That a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary reflects, the regulation requires demonstrable effect (*i. e.*, actual injury or death) on actual, individual members of the protected species.

By the dissent's reckoning, the regulation at issue here, in conjunction with 16 U. S. C. § 1540(a)(1), imposes liability for any habitat-modifying conduct that ultimately results in the death of a protected animal, "regardless of whether that result is intended or even foreseeable, and no matter how long

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*JUSTICE SCALIA suggests that, if the word "direct" merits emphasis in this sentence, then the sentence should be read as an effort to negate principles of proximate causation. See *post*, at 734–735, n. 5. As this case itself demonstrates, however, the word "direct" is susceptible of many meanings. The Court of Appeals, for example, used "direct" to suggest an element of purposefulness. See 17 F. 3d 1463, 1465 (CADC 1994). So, occasionally, does the dissent. See *post*, at 720 (describing "affirmative acts . . . which are *directed* immediately and intentionally against a particular animal") (emphasis added). It is not hard to imagine conduct that, while "indirect" (*i. e.*, nonpurposeful), proximately causes actual death or injury to individual protected animals, cf. *post*, at 732; indeed, principles of proximate cause routinely apply in the negligence and strict liability contexts.

the chain of causality between modification and injury." *Post,* at 715; see also *post,* at 719. Even if § 1540(a)(1) does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 559–560 (5th ed. 1984) (describing "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context). I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle. In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under § 1540(a)(1) only if their habitat-modifying actions proximately cause death or injury to protected animals. Cf. *Benefiel* v. *Exxon Corp.,* 959 F. 2d 805, 807–808 (CA9 1992) (in enacting the Trans-Alaska Pipeline Authorization Act, which provides for strict liability for damages that are the result of discharges, Congress did not intend to abrogate common-law principles of proximate cause to reach "remote and derivative" consequences); *New York* v. *Shore Realty Corp.,* 759 F. 2d 1032, 1044, and n. 17 (CA2 1985) (noting that "[t]raditional tort law has often imposed strict liability while recognizing a causation defense," but that, in enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Congress "specifically rejected including a causation requirement"). The regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word "actually," the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation.

Proximate causation is not a concept susceptible of precise definition. See Keeton, *supra*, at 280–281. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have recently said that proximate causation "normally eliminates the bizarre," *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 536 (1995), and have noted its "functionally equivalent" alternative characterizations in terms of foreseeability, see *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 475 (1877) ("natural and probable consequence"), and duty, see *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 546 (1994). Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent. See, *e. g., post,* at 719 (describing "a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish").

In my view, then, the "harm" regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act. Pursuant to my interpretation, *Palila II*—under which the Court of Appeals held that a state agency committed a "taking" by permitting mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently sustaining actual birds.

This case, of course, comes to us as a facial challenge. We are charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation *(Palila II)* that is, in my view, inconsistent with the regulation's *own* limitations. That misapplication does not, however, call into question the validity of the regulation itself. One can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority. However, it seems to me clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications. Congress may, of course, see fit to revisit this issue. And nothing the Court says today prevents the agency itself from narrowing the scope of its regulation at a later date.

With this understanding, I join the Court's opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

I

The Endangered Species Act of 1973 (Act), 16 U. S. C. § 1531 *et seq.* (1988 ed. and Supp. V), provides that "it is unlawful for any person subject to the jurisdiction of the United States to—. . . take any [protected] species within the United States." § 1538(a)(1)(B). The term "take" is defined as "to harass, *harm,* pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19) (emphasis added). The challenged regulation defines "harm" thus:

> "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (1994).

In my view petitioners must lose—the regulation must fall—even under the test of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), so I shall assume that the Court is correct to apply *Chevron.* See *ante,* at 703–704, and n. 18.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in-fact of death or injury to wildlife. *Any* "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury. See, *e. g., Palila* v. *Hawaii Dept. of Land and Natural Resources,* 852 F. 2d 1106, 1108–1109 (CA9 1988) *(Palila II)* (sheep grazing constituted "taking" of palila birds, since although sheep do not destroy full-grown mamane trees, they do destroy mamane seedlings, which will not grow to full-grown trees, on which the palila feeds and nests). See also Davison, Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act, 10 J. Land Use & Envtl. L. 155, 190 (1995) (regulation requires only causation-in-fact).

Second, the regulation does not require an "act": The Secretary's officially stated position is that an *omission* will do. The previous version of the regulation made this explicit. See 40 Fed. Reg. 44412, 44416 (1975) ("'Harm' in the definition of 'take' in the Act means an act or omission which actually kills or injures wildlife . . ."). When the regulation was modified in 1981 the phrase "or omission" was taken out, but only because (as the final publication of the rule advised) "the [Fish and Wildlife] Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)]." 46 Fed. Reg. 54748, 54750 (1981). In their brief here petitioners agree that the regulation covers omissions, see Brief for Petitioners 47 (although they argue that "[a]n 'omission' constitutes an 'act' . . . only if there is a legal duty to act"), *ibid.*

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. "Injury" in the regulation includes "significantly impairing essential behavioral patterns, including *breeding,*" 50 CFR § 17.3 (1994) (emphasis added). Impairment of breeding does not "injure" living creatures; it prevents them from propagating, thus "injuring" *a population* of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary's official pronouncements confirm. The Final Redefinition of "Harm" accompanying publication of the regulation said that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981), and refers to "injury *to a population,*" *id.,* at 54749 (emphasis added). See also *Palila II, supra,* at 1108;

Davison, *supra*, at 190, and n. 177, 195; M. Bean, The Evolution of National Wildlife Law 344 (1983).[1]

None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term "harm" in § 1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only *operative* term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, *e. g.*, 11 Oxford English Dictionary (1933) ("Take . . . To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer* v. *Connecticut*, 161 U. S. 519, 523 (1896) ("'[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them'") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*"). This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, *e. g.*, Migratory Bird Treaty Act, 16 U. S. C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U. S. T. 3918, 3921, T. I. A. S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of § 1538(a)(1), which makes it unlawful not only to take protected species, but also to import or export them,

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[1] The Court and JUSTICE O'CONNOR deny that the regulation has the first or the third of these features. I respond to their arguments in Part III, *infra*.

§ 1538(a)(1)(A); to possess, sell, deliver, carry, transport, or ship any taken species, § 1538(a)(1)(D); and to transport, sell, or offer to sell them in interstate or foreign commerce, §§ 1538(a)(1)(E), (F). The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts. § 1532(19). The tempting fallacy—which the Court commits with abandon, see *ante,* at 697–698, n. 10—is to assume that *once defined,* "take" loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a self-executing prohibition, and had not enacted § 1538(a)(1)(B) at all. But § 1538(a)(1)(B) *is* there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"—the only operative term—out of the statute altogether.[2]

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[2] The Court suggests halfheartedly that "take" cannot refer to the taking of particular animals, because § 1538(a)(1)(B) prohibits "tak[ing] any [endangered] *species.*" *Ante,* at 697, n. 10. The suggestion is halfhearted because that reading obviously contradicts the statutory intent. It would

That is what has occurred here. The verb "harm" has a *range* of meaning: "to cause injury" at its broadest, "to do hurt or damage" in a narrower and more direct sense. See, *e. g.*, 1 N. Webster, An American Dictionary of the English Language (1828) ("Harm, *v.t.* To hurt; to injure; to damage; *to impair soundness of body, either animal* or vegetable") (emphasis added); American College Dictionary 551 (1970) ("harm . . . *n.* injury; damage; hurt: *to do him bodily harm*"). In fact the more directed sense of "harm" is a somewhat more common and preferred usage; "*harm* has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended." J. Opdycke, Mark My Words: A Guide to Modern Usage and Expression 330 (1949). See also American Heritage Dictionary 662 (1985) ("*Injure* has the widest range. . . . *Harm* and *hurt* refer principally to what causes physical or mental distress to living things"). To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification is to choose a meaning that makes nonsense of the word that "harm" defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. "Harm" is merely one of 10 prohibitory words in § 1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" are

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mean no violation in the intentional shooting of a single bald eagle—or, for that matter, the intentional shooting of 1,000 bald eagles out of the extant 1,001. The phrasing of § 1538(a)(1)(B), as the Court recognizes elsewhere, see, *e. g., ante,* at 696, is shorthand for "take any [*member of* an endangered] species."

all affirmative acts (the provision itself describes them as "conduct," see § 1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words ("harass," "pursue," "wound," and "kill") "refer to actions or effects that do not require direct *applications of force.*" *Ante,* at 701 (emphasis added). That is true enough, but force is not the point. Even "taking" activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of "taking" the prey even before it has been touched. What the nine other words in § 1532(19) have in common—and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word—is the sense of affirmative conduct intentionally directed against a particular animal or animals.

I am not the first to notice this fact, or to draw the conclusion that it compels. In 1981 the Solicitor of the Fish and Wildlife Service delivered a legal opinion on § 1532(19) that is in complete agreement with my reading:

> "The Act's definition of 'take' contains a list of actions that illustrate the intended scope of the term . . . . With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis,* . . . the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Memorandum of Apr. 17, reprinted in 46 Fed. Reg. 29490, 29491 (1981) (emphasis in original).

I would call it *noscitur a sociis,* but the principle is much the same: The fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States*, 511 U. S. 368, 371 (1994). The Court contends that the canon cannot be applied to deprive a word of all its "independent meaning," *ante*, at 702. That proposition is questionable to begin with, especially as applied to long lawyers' listings such as this. If it were true, we ought to give the word "trap" in the definition its rare meaning of "to clothe" (whence "trappings")—since otherwise it adds nothing to the word "capture." See *Moskal* v. *United States*, 498 U. S. 103, 120 (1990) (SCALIA, J., dissenting). In any event, the Court's contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (*i. e.*, violates it *un*knowingly) may be assessed a civil penalty of $500 for each violation, with the stricture that "[e]ach such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities—for example, farming, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (*e. g.*, an "impairment" of breeding). The Court says that "[the strict-liability provision] is potentially sweeping, but it would be so with or without the Secretary's 'harm' regulation." *Ante,* at 696, n. 9. That is not correct. Without the regulation, the routine "habitat modifying" activities that people conduct to make a daily living would not carry exposure to strict penalties; only acts directed at animals, like those described by the other words in § 1532(19), would risk liability.

The Court says that "[to] read a requirement of intent or purpose into the words used to define 'take' . . . ignore[s] [§ 1540's] express provision that a 'knowin[g]' action is enough to violate the Act." *Ante,* at 701–702. This presumably means that because the reading of § 1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," *Staples* v. *United States,* 511 U. S. 600, 606 (1994). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see *ante,* at 696–697, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in § 1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word *as used everywhere in the Act.* Thus, the Secretary's interpretation of "harm" is wrong if it does not fit with the use of "take" throughout the Act. And it does not. In § 1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps. nets, and other equipment . . . used to aid the taking, possessing, selling, [etc.]" of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and backhoes." As another example, § 1539(e)(1) exempts "the taking of any endangered species" by Alaskan Indians and Eskimos "if such taking is primarily for subsistence purposes"; and provides that "[n]on-edible byproducts of species taken pursuant to this section may be sold . . . when made into authentic native articles of handicrafts and clothing." Surely these provisions apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification. The Act is full of like examples. See, *e. g.*, § 1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569 (1995), the regulation must fall.

The broader structure of the Act confirms the unreasonableness of the regulation. Section 1536 provides:

> "Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or *result in the destruction or adverse modification of habitat* of such species which is determined by the Secretary . . . to be critical." 16 U. S. C. § 1536(a)(2) (emphasis added).

The Act defines "critical habitat" as habitat that is "essential to the conservation of the species," §§ 1532(5)(A)(i), (A)(ii), with "conservation" in turn defined as the use of methods necessary to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary," § 1532(3).

These provisions have a double significance. Even if §§ 1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions—the former applying only to federal agencies and their licensees, the latter only to private parties—Congress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U. S. 200, 208 (1993) (internal quotation marks omitted). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define "critical habitat" as used in § 1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible "habitat modification" (under the guise of "harm") in § 1538(a)(1)(B).

In fact, however, §§ 1536(a)(2) and 1538(a)(1)(B) do *not* operate in separate realms; federal agencies are subject to *both*, because the "person[s]" forbidden to take protected species under § 1538 include agencies and departments of the Federal Government. See § 1532(13). This means that the "harm" regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See *Ratzlaf* v. *United States*, 510 U. S. 135, 140–141 (1994). By defining "harm" in the definition of "take" in § 1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in § 1536(a)(2) almost wholly superfluous. As "critical habitat" is habitat "essential to the conservation of the species," adverse modification of "critical" habitat by a federal agency would also constitute habitat modification that injures a population of wildlife.

Petitioners try to salvage some independent scope for § 1536(a)(2) by the following contortion: Because the definition of critical habitat includes not only "the specific areas within the geographical area occupied by the species [that are] essential to the conservation of the species," § 1532(5)(A)(i), but also "specific areas outside the geographical area occupied by the species at the time it is listed [as a protected species] . . . [that are] essential to the conservation of the species," § 1532A(5)(ii), there may be some agency modifications of critical habitat which do *not* injure a population of wildlife. See Brief for Petitioners 41, and n. 27. This is dubious to begin with. A principal way to injure wildlife under the Secretary's own regulation is to "significantly impai[r] . . . breeding," 50 CFR § 17.3 (1994). To prevent the natural increase of a species by adverse modification of habitat suitable for expansion assuredly impairs breeding. But even if true, the argument only narrows the scope of the superfluity, leaving as so many wasted words the § 1532(a)(5)(i) definition of critical habitat to include currently *occupied* habitat essential to the species' conservation. If the Secretary's definition of "harm" under § 1538(a)(1)(B) is to be upheld, we must believe that Congress enacted § 1536(a)(2) solely because in its absence federal agencies would be able to modify habitat in currently *unoccupied* areas. It is more rational to believe that the Secretary's expansion of § 1538(a)(1)(B) carves out the heart of one of the central provisions of the Act.

II

The Court makes four other arguments. First, "the broad purpose of the [Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." *Ante*, at 698.

I thought we had renounced the vice of "simplistically . . . assum[ing] that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* (emphasis in original). Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text. "The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.[3]

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary's definition. See *ante*, at 704–706. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see *Chicago* v. *Environmental Defense Fund*, 511 U. S. 328, 337 (1994); here it shows quite the opposite of what the Court says. I shall not pause to discuss the Court's reliance on such statements in the Committee Reports as "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'" S. Rep. No. 93–307, p. 7 (1973) (quoted *ante*, at 704). This sort of empty flourish—to the effect that "this statute means what it means all the way"—

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[3] This portion of the Court's opinion, see *ante*, at 699, n. 12, discusses and quotes a footnote in *TVA* v. *Hill*, 437 U. S. 153, 184–185, n. 30 (1978), in which we described the then-current version of the Secretary's regulation, and said that the habitat modification undertaken by the federal agency in the case would have violated the regulation. Even if we had said that the Secretary's regulation was *authorized* by § 1538, that would have been utter dictum, for the only provision at issue was § 1536. See *id.*, at 193. But in fact we simply opined on the effect of the regulation while assuming its validity, just as courts always do with provisions of law whose validity is not at issue.

counts for little even when enacted into the law itself. See *Reves* v. *Ernst & Young*, 507 U. S. 170, 183–184 (1993).

Much of the Court's discussion of legislative history is devoted to two items: first, the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take," with the observation that (along with other amendments) it would "'help to achieve the purposes of the bill'"; second, the relevant Committee's removal from the definition of a provision stating that "take" includes "'the destruction, modification or curtailment of [the] habitat or range'" of fish and wildlife. See *ante*, at 705. The Court inflates the first and belittles the second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have *direct* evidence of what those who brought the legislation to the floor thought it meant—evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote. See *ante*, at 706–707, n. 19.

Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of § 1534, while § 1538 solved a different problem altogether—the problem of takings. Senator Tunney stated:

> "*Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*
>
> "Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes.* The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973) (emphasis added).

The House floor manager, Representative Sullivan, put the same thought in this way:

> "[T]he principal threat to animals stems from destruction of their habitat. . . . *[The bill] will meet this problem by providing funds for acquisition of critical habitat.* . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves.*
>
> "Another hazard to endangered species arises from those who would *capture or kill them for pleasure or profit.* There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.*, at 30162 (emphasis added).

Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. The Court really has no explanation for these statements. All it can say is that "[n]either statement even suggested that [the habitat acquisition funding provision in § 1534] would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [§ 1538]." *Ante*, at 707, n. 19. That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." The Court points out triumphantly that they do not display the understanding (3) that the land acquisition program is "the [Act's] only response to habitat modification." *Ibid.* Of course not, since that is not so (all *public* lands are subject to habitat-modification restrictions); but (1) and (2) are quite enough to exclude the Court's interpretation. They identify the land acquisition program as the Act's only response to habitat modification *by private landowners,* and thus do not in the least "contradic[t]," *ibid.,* the fact that § 1536 prohibits habitat modification *by federal agencies.*

Third, the Court seeks support from a provision that was added to the Act in 1982, the year after the Secretary promulgated the current regulation. The provision states:

> "[T]he Secretary may permit, under such terms and conditions as he shall prescribe—
>
> . . . . .
>
> "any taking otherwise prohibited by section 1538 (a)(1)(B) . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. § 1539(a)(1)(B).

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in § 1538(a)(1)(B) nor the definition in § 1532(19) was reenacted. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 185 (1994). The Court claims, however, that the provision "strongly suggests that Congress understood [§ 1538(a)(1)(B)] to prohibit indirect as well as deliberate takings." *Ante,* at 700. That would be a valid inference if habitat modification were the only substantial "otherwise lawful activity" that might incidentally and nonpurposefully cause a prohibited "taking." Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species—as when fishing for unprotected salmon also takes an endangered species of salmon, see *Pacific Northwest Generating Cooperative* v. *Brown,* 38 F. 3d 1058, 1067 (CA9 1994).

Congress has referred to such "incidental takings" in other statutes as well—for example, a statute referring to "the incidental taking of . . . sea turtles in the course of . . . harvesting [shrimp]" and to the "rate of incidental taking of sea turtles by United States vessels in the course of such harvesting," 103 Stat. 1038, § 609(b)(2), note following 16 U. S. C. § 1537 (1988 ed., Supp. V); and a statute referring to "the incidental taking of marine mammals in the course of commercial fishing operations," 108 Stat. 546, § 118(a). The Court shows that it misunderstands the question when it says that "[n]o one could seriously request an 'incidental' take permit to avert . . . liability for direct, deliberate action *against a member of an endangered or threatened species.*" *Ante*, at 700–701 (emphasis added). That is not an *incidental* take at all.[4]

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. See S. Rep. No. 97–418, p. 10 (1982); H. R. Conf. Rep. No. 97–835, pp. 30–32 (1982). But the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. See *Chicago* v. *Environmental Defense Fund*, 511 U. S. 328 (1994). There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.

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[4] The statutory requirement of a "conservation plan" is as consistent with this construction as with the Court's. See *ante*, at 700, and n. 14. The commercial fisherman who is in danger of incidentally sweeping up protected fish in his nets can quite reasonably be required to "minimize and mitigate" the "impact" of his activity. 16 U. S. C. § 1539(a)(2)(A).

Fourth and lastly, the Court seeks to avoid the evident shortcomings of the regulation on the ground that the respondents are challenging it on its face rather than as applied. See *ante*, at 699; see also *ante*, at 709 (O'CONNOR, J., concurring). The Court seems to say that *even if* the regulation dispenses with the foreseeability of harm that it acknowledges the statute to require, that does not matter because this is a facial challenge: So long as habitat modification that *would* foreseeably cause harm is prohibited by the statute, the regulation must be sustained. Presumably it would apply the same reasoning to all the other defects of the regulation: The regulation's failure to require injury to particular animals survives the present challenge, because at least *some* environmental modifications kill particular animals. This evisceration of the facial challenge is unprecedented. It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x.* It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present.* On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i. e.*, one requiring the various elements of liability that this regulation omits.

III

In response to the points made in this dissent, the Court's opinion stresses two points, neither of which is supported by the regulation, and so cannot validly be used to uphold it. First, the Court and the concurrence suggest that the regulation should be read to contain a requirement of proximate causation or foreseeability, principally *because the statute does*—and "[n]othing in the regulation purports to weaken those requirements [of the statute]." See *ante*, at 696–697, n. 9; 700, n. 13; see also *ante*, at 711–713 (O'CONNOR, J., concurring). I quite agree that the statute contains such a limitation, because the verbs of purpose in § 1538(a)(1)(B) denote action directed at animals. *But the Court has rejected that reading.* The critical premise on which it has upheld the regulation is that, despite the weight of the other words in § 1538(a)(1)(B), "the statutory term 'harm' encompasses indirect as well as direct injuries," *ante*, at 697–698. See also *ante*, at 698, n. 11 (describing "the sense of indirect causation that 'harm' adds to the statute"); *ante*, at 702 (stating that the Secretary permissibly interprets "'harm'" to include "indirectly injuring endangered animals"). Consequently, unless there is some strange category of causation that is indirect and yet also proximate, the Court has already rejected its own basis for finding a proximate-cause limitation in the regulation. In fact "proximate" causation simply *means* "direct" causation. See, *e. g.*, Black's Law Dictionary 1103

(5th ed. 1979) (defining "[p]roximate" as "Immediate; nearest; *direct*") (emphasis added); Webster's New International Dictionary 1995 (2d ed. 1949) ("[P]roximate cause. A cause which *directly*, or with no mediate agency, produces an effect") (emphasis added).

The only other reason given for finding a proximate-cause limitation in the regulation is that "by use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation." *Ante,* at 712 (O'CONNOR, J., concurring); see also *ante,* at 700, n. 13 (majority opinion). *Non sequitur,* of course. That the injury must be "actual" as opposed to "potential" simply says nothing at all about the length or foreseeability of the causal chain between the habitat modification and the "actual" injury. It is thus true and irrelevant that "[t]he Secretary did not need to include 'actually' to connote 'but for' causation," *ibid.;* "actually" defines the requisite *injury*, not the requisite *causality*.

The regulation says (it is worth repeating) that "harm" means (1) an act that (2) actually kills or injures wildlife. If that does not dispense with a proximate-cause requirement, I do not know what language would. And changing the regulation by judicial invention, even to achieve compliance with the statute, is not permissible. Perhaps the agency itself would prefer to achieve compliance in some other fashion. We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See *Chevron,* 467 U. S., at 843–845. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, see *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.

The second point the Court stresses in its response seems to me a belated mending of its holding. It apparently *concedes* that the statute requires injury *to particular animals* rather than merely to populations of animals. See *ante,* at 700, n. 13; *ante,* at 696 (referring to killing or injuring "*members* of [listed] species" (emphasis added)). The Court then rejects my contention that the regulation ignores this requirement, since, it says, "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'" *Ante,* at 700, n. 13. As I have pointed out, see *supra,* at 716–717, this reading is incompatible with the regulation's specification of impairment of "breeding" as one of the *modes* of "kill[ing] or injur[ing] wildlife."[5]

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[5] JUSTICE O'CONNOR supposes that an "impairment of breeding" intrinsically injures an animal because "to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." *Ante,* at 710 (concurring opinion). This imaginative construction does achieve the result of extending "impairment of breeding" to individual animals; but only at the expense of also expanding "injury" to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual animal from impairment of that "essential function" is not the failure of issue (which harms only the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes *that* psychic harm, then why not the psychic harm of not being able to frolic about—so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that "injury" in the regulation includes injury to populations of animals. Even more so with the concurrence's alternative explanation: that "impairment of breeding" refers to nothing more than concrete injuries inflicted by the habitat modification on the animal who does the breeding, such as "physical complications [suffered] during gestation," *ibid.* Quite obviously, if "impairment of breeding" meant

But since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well—law à la carte. As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a "taking," but only if it results in the killing or harming of *individual animals,* and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the *breeding,* of butterflies, would not violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act—not for the utterly unsupported reason that habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a "take."

* * *

The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large,

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such physical harm to an individual animal, it would not have had to be mentioned.

The concurrence entangles itself in a dilemma while attempting to explain the Secretary's commentary to the harm regulation, which stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981). The concurrence denies that this means that the regulation does not require injury to particular animals, because "one could just as easily emphasize the word 'direct' in this sentence as the word 'individual.'" *Ante,* at 711. One could; but if the concurrence does, it thereby refutes its separate attempt to exclude indirect causation from the regulation's coverage, see *ante,* at 711–713. The regulation, after emerging from the concurrence's analysis, has acquired *both* a proximate-cause limitation *and* a particular-animals limitation—precisely the one meaning that the Secretary's quoted declaration will not allow, whichever part of it is emphasized.

rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.

UNITED STATES *v.* HAYS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 94–558. Argued April 19, 1995—Decided June 29, 1995*

Appellees claim in this litigation that Louisiana's congressional redistricting plan (Act 1) is a racial gerrymander that violates the Fourteenth Amendment's Equal Protection Clause. While their claim's primary focus is District 4, a majority-minority district, appellees live in District 5. The District Court invalidated Act 1, and the State and the United States, which had precleared Act 1 pursuant to its authority under the Voting Rights Act of 1965, appealed directly to this Court.

Held: Appellees lack standing to challenge Act 1. This Court has recognized that a generalized grievance against allegedly illegal governmental conduct is insufficient to provide standing, see, *e. g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, and has applied that rule in the equal protection context, see *Allen* v. *Wright*, 468 U. S. 737, 755. Thus, appellees' position that "anybody in the State" can state a racial gerrymander claim is rejected, and they must show that they, personally, have been subjected to a racial classification. Appellees, however, have pointed to no evidence tending to show that they have suffered personal injury, and review of the record has revealed none. Assuming, *arguendo*, that the evidence here is sufficient to state a claim under *Shaw* v. *Reno*, 509 U. S. 630, with respect to District 4, it does not prove that the state legislature intended District 5 to have a particular racial composition. Similarly, the fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean that *every* voter has standing to challenge Act 1 as a racial classification. The Court's holding in *Powers* v. *Ohio*, 499 U. S. 400, that an individual has the right not to be excluded from a jury on account of race does not support appellees' position. A juror so excluded has personally suffered the race-based harm recognized in *Powers*, and it is the fact of *personal* injury that appellees have failed to establish here. Pp. 742–747.

862 F. Supp. 119, vacated and remanded.

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*Together with No. 94–627, *Louisiana et al.* v. *Hays et al.*, also on appeal from the same court.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 750. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 750. GINSBURG, J., concurred in the judgment.

Richard P. Ieyoub, Jr., Attorney General of Louisiana, argued the cause for the state appellants. With him on the briefs were *Roy A. Mongrue, Jr.*, and *Angie Rogers LaPlace*, Assistant Attorneys General, and *Paul R. Baier*. *Solicitor General Days* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Patrick, Deputy Solicitor General Bender, Irving L. Gornstein, Jessica Dunsay Silver*, and *Mark L. Gross*.

Edward W. Warren argued the cause for appellees. With him on the brief were *Christopher Landau* and *Jay P. Lefkowitz*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

We held in *Shaw* v. *Reno*, 509 U. S. 630 (1993), that a plaintiff may state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment by alleging that a State "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.*, at 658. Appellees Ray Hays, Edward Adams, Susan Shaw Singleton, and Gary Stokley claim that the State of Louisiana's congressional districting plan is such a "racial gerrymander," and that it violates the Fourteenth Amendment. But appellees do not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification. For that reason, we conclude that appellees lack standing to bring this lawsuit.

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†Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Laughlin McDonald, Neil Bradley*, and *Steven R. Shapiro;* for the Congressional Black Caucus by *A. Leon Higginbotham, Jr.*, and *Pamela S. Karlan;* for the National Bar Association et al. by *Koteles Alexander* and *Brian J. Murphy;* and for Bernadine St. Cyr et al. by *Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin, Charles Stephen Ralston, Jacqueline A. Berrien, Thomas J. Henderson, Brenda Wright, J. Gerald Hebert*, and *Robert B. McDuff*.

Briefs of *amici curiae* urging affirmance were filed for the Pacific Legal Foundation by *Anthony T. Caso* and *Deborah J. La Fetra;* for the South Carolina Senate et al. by *Mark A. Packman* and *Benjamin E. Griffith;* and for Ruth O. Shaw et al. by *Robinson O. Everett* and *Clifford Dougherty*.

William H. Mellor III filed a brief for the Institute for Justice as *amicus curiae*.

I

Louisiana has been covered by § 4(b) of the Voting Rights Act of 1965 (VRA), 79 Stat. 438, as amended, 84 Stat. 315, 42 U. S. C. § 1973b(b), since November 1, 1964, see 28 CFR pt. 51, App. The effect of such coverage is set forth in VRA § 5, 42 U. S. C. § 1973c: Whenever a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must first either obtain a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or receive "preclearance" from the Attorney General to the same effect. Any redistricting plan in Louisiana is subject to these requirements.

Accordingly, in 1991, Louisiana submitted to the Attorney General for preclearance a districting plan for its Board of Elementary and Secondary Education (BESE). Louisiana's BESE districts historically have paralleled its congressional districts, so the submitted plan contained one majority-minority district (that is, a district "in which a majority of the population is a member of a specific minority group," *Voinovich* v. *Quilter*, 507 U. S. 146, 149 (1993)) out of eight, as did Louisiana's congressional districting plan then in force.* The Attorney General refused to preclear the plan, claiming that Louisiana had failed to demonstrate that its decision not to create a second majority-minority district was free of racially discriminatory purpose. See Defense Exh. 17 in No. 92–1522 (WD La.) (letter from U. S. Dept. of Justice, Assistant Attorney General John Dunne, to Louisiana Assistant Attorney General Angie R. LaPlace, Oct. 1, 1991). The Attorney General subsequently precleared a revised BESE plan, which contained two majority-minority districts. See Brief for Appellants State of Louisiana et al. 3, n. 2.

As a result of the 1990 census, Louisiana's congressional delegation was reduced from eight to seven representatives, requiring Louisiana to redraw its district boundaries. Perhaps in part because of its recent experience with the BESE districts, the Louisiana Legislature set out to create a districting plan containing two majority-minority districts. See, *e. g.*, Tr. 11 (Aug. 19, 1993). Act 42 of the 1992 Regular Session, passed in May 1992, was such a plan. One of Act 42's majority-minority districts, District 2, was located in the New Orleans area and resembled the majority-minority district in the previous district map. The other, District 4, was "[a] Z-shaped creature" that "zigzag[ged] through all or part of 28 parishes and five of Louisiana's largest cities." Congressional Quarterly, Congressional Districts in the 1990s, p. 323 (1993). A map of Louisiana's congressional districts

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*Between Reconstruction and the early 1980's, all of Louisiana's congressional districts contained a majority of white citizens, and it had not elected any black congressional representatives. In 1983, a three-judge court invalidated Louisiana's 1982 districting plan, on the ground that it diluted minority voting strength in the New Orleans area in violation of VRA § 2, 42 U. S. C. § 1973, and ordered the legislature to draw up a new plan. See *Major* v. *Treen*, 574 F. Supp. 325 (ED La. 1983). The new plan contained a majority-black district in the New Orleans area; in 1990, that district elected Louisiana's first black representative since Reconstruction. See Congressional Quarterly, Congressional Districts in the 1990s, pp. 319–320 (1993).

under Act 42 is attached as Appendix A. The Attorney General precleared Act 42.

Appellees Hays, Adams, Singleton, and Stokley are residents of Lincoln Parish, which is located in the north-central part of Louisiana. According to the complaint, all but Singleton reside in that part of Lincoln Parish that was contained in the majority-minority District 4 of Act 42. See Pet. for Permanent Injunction and Declaratory Judgment in No. CV 92–1522 (WD La.), p. 4. In August 1992, appellees filed suit in state court, challenging Act 42 under the State and Federal Constitutions, as well as the VRA. The State removed the case to the United States District Court for the Western District of Louisiana, and, as required by the VRA, a three-judge court convened to hear the case pursuant to 28 U. S. C. § 2284. After a 2-day trial, the District Court denied appellees' request for a preliminary injunction, denied the state and federal constitutional claims, and took the VRA claims under advisement. While the case was pending, this Court decided *Shaw* v. *Reno*, whereupon the District Court revoked its prior rulings and held another 2-day hearing. Focusing almost exclusively on the oddly shaped District 4, the District Court decided that Act 42 violated the Constitution, and enjoined its enforcement. See *Hays* v. *Louisiana*, 839 F. Supp. 1188 (WD La. 1993) *(Hays I)*.

Louisiana appealed directly to this Court, pursuant to 28 U. S. C. § 1253. While the appeal was pending, the Louisiana Legislature repealed Act 42 and enacted a new districting plan, Act 1 of the 1994 Second Extraordinary Session. The Attorney General precleared Act 1. We then vacated the District Court's judgment and remanded the case "for further consideration in light of Act 1." 512 U. S. 1230 (1994). A map of Act 1 is attached as Appendix B.

Act 1, like Act 42, contains two majority-minority districts, one of which (District 2) is again located in the New Orleans area. The second majority-minority district in Act 1, however, is considerably different from that in Act 42. While

Act 42's District 4 ran in a zigzag fashion along the northern and eastern borders of the State, Act 1's District 4 begins in the northwestern part of the State and runs southeast along the Red River until it reaches Baton Rouge. For present purposes, the most significant difference between the two district maps is that in Act 42, part of Lincoln Parish was contained in District 4, while in Act 1, Lincoln Parish is entirely contained in District 5.

On remand, the District Court allowed appellees to amend their complaint to challenge Act 1's constitutionality and permitted the United States to intervene as a defendant. It then held another 2-day hearing and concluded, largely for the same reasons that it had invalidated Act 42, that Act 1 was unconstitutional. See *Hays* v. *Louisiana,* 862 F. Supp. 119 (WD La. 1994) *(Hays II).* The court enjoined the State from conducting any elections pursuant to Act 1, substituted its own districting plan, and denied the State's motion for a stay of judgment pending appeal.

Louisiana and the United States appealed directly to this Court. We stayed the District Court's judgment, 512 U. S. 1273 (1994), and noted probable jurisdiction, 513 U. S. 1056 (1994).

II

The District Court concluded that appellees had standing to challenge Act 42, see *Hays I,* 839 F. Supp., at 1192, but did not reconsider standing when faced with Act 1. The question of standing is not subject to waiver, however: "[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc.* v. *Dallas,* 493 U. S. 215, 230–231 (1990) (citations omitted).

It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (footnote, citations, and internal quotation marks omitted); see also, *e. g., Allen* v. *Wright*, 468 U. S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power. See, *e. g., Valley Forge Christian College, supra; Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974); *United States* v. *Richardson*, 418 U. S. 166 (1974); *Ex parte Lévitt*, 302 U. S. 633 (1937) *(per curiam).* We have also made clear that "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936), 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.' *Warth* v. *Seldin*, 422 U. S. 490, 518 (1975)." *FW/PBS, supra*, at 231. And when a case has proceeded to final judgment after a trial, as this case has, "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial'" to avoid dismissal on standing grounds. *Lujan, supra*, at 561 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 115, n. 31 (1979)).

The rule against generalized grievances applies with as much force in the equal protection context as in any other. *Allen* v. *Wright* made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." 468 U. S., at 755 (quoting *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984)); see also *Valley Forge Christian College*, *supra*, at 489–490, n. 26 (disapproving the proposition that every citizen has "standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws"). We therefore reject appellees' position that "anybody in the State has a claim," Tr. of Oral Arg. 36, and adhere instead to the principles outlined above.

We discussed the harms caused by racial classifications in *Shaw*. We noted that, in general, "[t]hey threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." 509 U. S., at 643. We also noted "representational harms" the particular type of racial classification at issue in *Shaw* may cause: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.*, at 648. Accordingly, we held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.*, at 644 (citation omitted). Any citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court.

Demonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another. See *id.*, at 646 (noting "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race"). Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action, cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U. S. 656 (1993). Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

In this litigation, appellees have not produced evidence sufficient to carry the burden our standing doctrine imposes upon them. Even assuming (without deciding) that Act 1 causes injury sufficient to invoke strict scrutiny under *Shaw,* appellees have pointed to *no* evidence tending to show that *they* have suffered that injury, and our review of the record has revealed none. Neither Act 1 itself, see App. to Juris. Statement for Louisiana et al. 111–120; Appendix B, *infra,* nor any other evidence in the record indicates that appellees, or any other residents of Lincoln Parish, have been subjected to racially discriminatory treatment. The record does contain evidence tending to show that the legislature was *aware* of the racial composition of District 5, and of Lincoln Parish. We recognized in *Shaw,* however, that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." 509 U. S., at 646. It follows that proof of "[t]hat sort of race consciousness" in the redistricting process is inadequate to establish injury in fact. *Ibid.*

Appellees urge that District 5 is a "segregated" voting district, and thus that their position is no different from that of a student in a segregated school district, see Brief for Appellees 17 (citing *Brown* v. *Board of Education*, 347 U. S. 483 (1954)); Tr. of Oral Arg. 33. But even assuming, *arguendo*, that the evidence in this litigation is enough to state a *Shaw* claim with respect to District 4, that does not prove anything about the legislature's intentions with respect to District 5, nor does the record appear to reflect that the legislature intended District 5 to have any particular racial composition. Of course, it may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment. We have never held that the racial composition of a particular voting district, without more, can violate the Constitution. Cf. *Shaw, supra,* at 644–649; *Mobile* v. *Bolden*, 446 U. S. 55 (1980).

Appellees insist that they challenged Act 1 in its entirety, not District 4 in isolation. Tr. of Oral Arg. 36. That is true. It is also irrelevant. The fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that *every* Louisiana voter has standing to challenge Act 1 as a racial classification. Only those citizens able to allege injury "as a direct result of having *personally* been denied equal treatment," *Allen*, 468 U. S., at 755 (emphasis added), may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits.

Appellees' reliance on *Powers* v. *Ohio*, 499 U. S. 400 (1991), is unavailing. *Powers* held that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.*, at 409. But of course, where an individual juror is excluded from a jury because of race, that juror has *personally* suffered the race-based harm recognized in *Powers,* and it is the fact of *personal* injury that appellees have failed to establish here. Thus, appellees' argument that "they *do* have a right not to be placed into or excluded from a district because of the color of their skin," Brief for Appellees 16, cannot help them, because they have not established that *they* have suffered such treatment in this litigation.

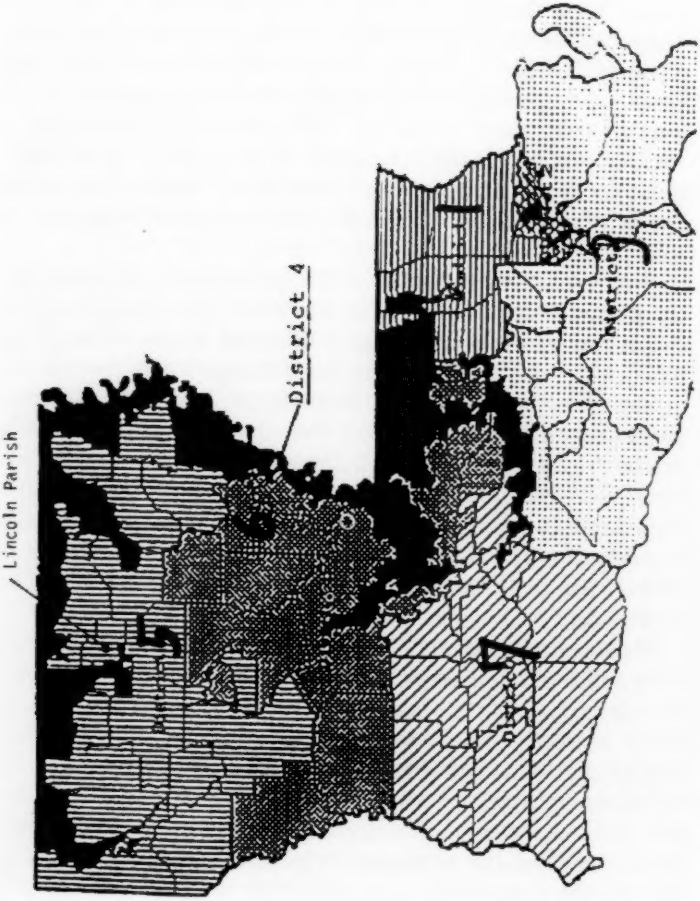
JUSTICE STEVENS agrees that appellees lack standing, but on quite different grounds: In his view, appellees' failure to allege and prove vote dilution deprives them of standing, irrespective of whether they have alleged and proved the injury discussed in *Shaw. Post,* at 751; see also *Miller* v. *Johnson, post,* at 931 (STEVENS, J., dissenting). Justice White's dissenting opinion in *Shaw* argued that position, see *Shaw,* 509 U. S., at 659 ("Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury"); *post,* at 751–752 (quoting Justice White's dissent in *Shaw*), but it did not prevail. JUSTICE STEVENS offers no special reason to revisit the issue here.

We conclude that appellees have failed to show that they have suffered the injury our standing doctrine requires. Appellees point us to no authority for the proposition that an equal protection challenge may go forward in federal court absent that showing of individualized harm, and we decline appellees' invitation to approve that proposition in this litigation. Accordingly, the judgment of the District Court is vacated, and the cases are remanded with instructions to dismiss the complaint.

It is so ordered.

JUSTICE GINSBURG concurs in the judgment.

APPENDIX A TO OPINION OF THE COURT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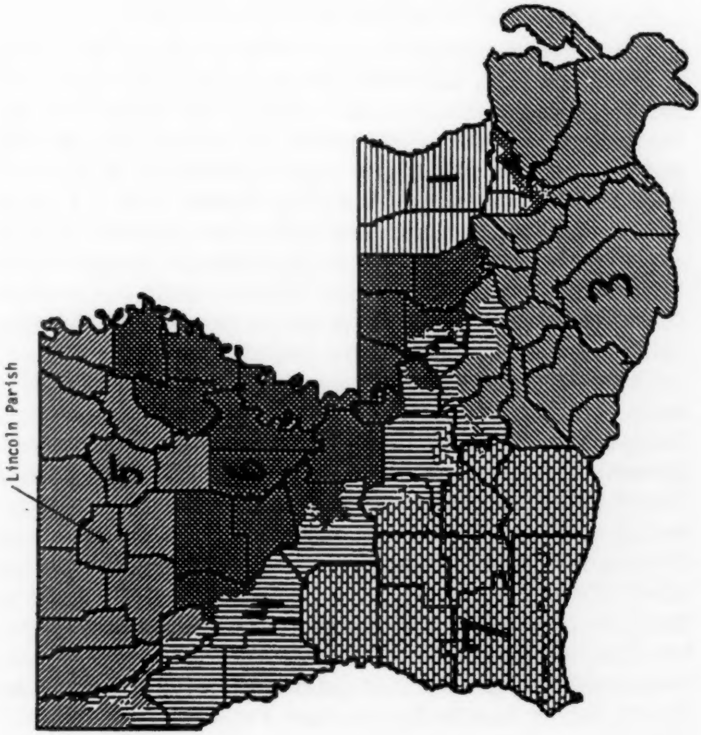
APPENDIX B TO OPINION OF THE COURT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JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion to the extent that it discusses voters, such as those before us, who do not reside within the district that they challenge.

JUSTICE STEVENS, concurring in the judgment.

The majority apparently would find standing under *Shaw* v. *Reno*, 509 U. S. 630 (1993), for plaintiffs of all races who resided in an electoral district in which "the legislatur[e] reli[ed] on racial criteria" to classify all voters, *ante*, at 745, and who could show that they were " 'placed into or excluded from a district because of the color of their skin,' " *ante*, at 747 (citing Brief for Appellees 16). The majority fails to explain coherently how a State discriminates invidiously by deliberately joining members of different races in the same district; why such placement amounts to an injury to members of any race; and, assuming it does, to whom.

The term "gerrymander" has long been understood to mean "any set of districts which gives some advantage to the party which draws the electoral map." P. Musgrove, General Theory of Gerrymandering 6 (1977). As Justice Powell noted, "a colorable claim of discriminatory gerrymandering presents a justiciable controversy under the Equal Protection Clause." *Davis* v. *Bandemer*, 478 U. S. 109, 185 (1986) (dissenting opinion); see also *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). The complaint in this litigation, however, did not allege a discriminatory gerrymander. Appellees made no claim that any political or racial majority had drawn district lines to disadvantage a weaker segment of the community. Indeed, the complaint did not even identify the race or the political affiliation of any of the appellees. It simply alleged that every voter in Louisiana was injured by being deprived of the right "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not limited or abridged on account of the designated race or color of the majority of the voters placed in the designated districts." Pet. for Permanent Injunction and Declaratory Judgment in No. CV 92–1522 (WD La.), p. 8, ¶ 29.

Because the Court does not recognize standing to enforce "'a personal right to a government that does not deny equal protection of the laws,'" *ante*, at 744 (citing *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489–490, n. 26 (1982)), it holds that the mere fact of appellees' Louisiana residency does not give them standing. I agree with that conclusion. What I do not understand is the majority's view that these racially diverse appellees should fare better if they resided in black-majority districts instead of white-majority districts. Appellees have not alleged or proved that the State's districting has substantially disadvantaged any group of voters in their opportunity to influence the political process. They therefore lack standing to argue that Louisiana has adopted an unconstitutional gerrymander. See *Davis*, 478 U. S., at 125, 132–133. Even under a standing analysis that applied a more lenient rule for the victims of racial gerrymandering, see *id.*, at 151–152 (O'CONNOR, J., concurring in judgment), appellees could not prevail, because they fail to allege having been "shut out of the political process." *Id.*, at 139 (opinion of White, J.).

Accordingly, I cannot join the Court's opinion. I would simply hold that appellees have not made out the essential elements of a gerrymandering claim for the same reasons set forth in Justice White's dissenting opinion in *Shaw:*

> "Because districting inevitably is the expression of interest group politics, and because 'the power to influence the political process is not limited to winning elections,' the question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied

> its chance to effectively influence the political process.' Thus, 'an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively.*'" *Shaw,* 509 U. S., at 662–663 (quoting *Davis,* 478 U. S., at 132–133) (emphasis in original).

Because these appellees have not alleged any legally cognizable injury, I agree that they lack standing. I therefore concur in the judgment.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD ET AL. *v.* PINETTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94–780. Argued April 26, 1995—Decided June 29, 1995

Ohio law makes Capitol Square, the statehouse plaza in Columbus, a forum for discussion of public questions and for public activities, and gives petitioner Capitol Square Review and Advisory Board (Board) responsibility for regulating access to the square. To use the square, a group must simply fill out an official application form and meet several speech-neutral criteria. After the Board denied, on Establishment Clause grounds, the application of respondent Ku Klux Klan to place an unattended cross on the square during the 1993 Christmas season, the Klan filed this suit. The District Court entered an injunction requiring issuance of the requested permit, and the Board permitted the Klan to erect its cross. The Sixth Circuit affirmed the judgment, adding to a conflict among the Courts of Appeals as to whether a private, unattended display of a religious symbol in a public forum violates the Establishment Clause.

Held: The judgment is affirmed.

30 F. 3d 675, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Because the courts below addressed only the Establishment Clause issue and that is the sole question upon which certiorari was granted, this Court will not consider respondents' contention that the State's disapproval of the Klan's political views, rather than its desire to distance itself from sectarian religion, was the genuine reason for disallowing the cross display. Pp. 759–760.

2. The display was private religious speech that is as fully protected under the Free Speech Clause as secular private expression. See, *e. g., Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384. Because Capitol Square is a traditional public forum, the Board may regulate the content of the Klan's expression there only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45. Pp. 760–761.

3. Compliance with the Establishment Clause may be a state interest sufficiently compelling to justify content-based restrictions on speech,

see, *e. g., Lamb's Chapel,* 508 U. S., at 394–395, but the conclusion that that interest is not implicated in this case is strongly suggested by the presence here of the factors the Court considered determinative in striking down state restrictions on religious content in *Lamb's Chapel, id.,* at 395, and *Widmar* v. *Vincent,* 454 U. S. 263, 274. As in those cases, the State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups. Pp. 761–763.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS, concluded in Part IV that petitioners' attempt to distinguish this case from *Lamb's Chapel* and *Widmar* is unavailing. Petitioners' argument that, because the forum's proximity to the seat of government may cause the misperception that the cross bears the State's approval, their content-based restriction is constitutional under the so-called "endorsement test" of, *e. g., County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, and *Lynch* v. *Donnelly,* 465 U. S. 668, is rejected. Their version of the test, which would attribute private religious expression to a neutrally behaving government, has no antecedent in this Court's Establishment Clause jurisprudence, which has consistently upheld neutral government policies that happen to benefit religion. Where the Court has tested for endorsement, the subject of the test was either expression *by the government itself, Lynch, supra,* or else government action alleged to *discriminate in favor* of private religious expression or activity, see, *e. g., Allegheny, supra.* The difference between forbidden *government* speech endorsing religion and protected *private* speech that does so is what distinguishes *Allegheny* and *Lynch* from *Widmar* and *Lamb's Chapel.* The distinction does not disappear when the private speech is conducted close to the symbols of government. Given a traditional or designated public forum, publicly announced and open to all on equal terms, as well as purely private sponsorship of religious expression, erroneous conclusions of state endorsement do not count. See *Lamb's Chapel, supra,* at 395, and *Widmar, supra,* at 274. Nothing prevents Ohio from requiring all private displays in the square to be identified as such, but it may not, on the claim of misperception of official endorsement, ban all private religious speech from the square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship. Pp. 763–769.

JUSTICE O'CONNOR, joined by JUSTICE SOUTER and JUSTICE BREYER, concluded that the State has not presented a compelling justification for denying respondents' permit. Pp. 772–783.

(a) The endorsement test supplies an appropriate standard for determining whether governmental practices relating to speech on religious topics violate the Establishment Clause, even where a neutral state policy toward private religious speech in a public forum is at issue. Cf., *e. g., Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 395. There is no necessity to carve out, as does the plurality opinion, an exception to the test for the public forum context. Pp. 773–778.

(b) On the facts of this case, the reasonable observer would not fairly interpret the State's tolerance of the Klan's religious display as an endorsement of religion. See, *e. g., Lamb's Chapel, supra,* at 395. In this context, the "reasonable observer" is the personification of a community ideal of reasonable behavior, determined by the collective social judgment, whose knowledge is not limited to information gleaned from viewing the challenged display, but extends to the general history of the place in which the display appears. In this case, therefore, such an observer may properly be held, not simply to knowledge that the cross is purely a religious symbol, that Capitol Square is owned by the State, and that the seat of state government is nearby, but also to an awareness that the square is a public space in which a multiplicity of secular and religious groups engage in expressive conduct, as well as to an ability to read and understand the disclaimer that the Klan offered to include in its display. Pp. 778–782.

JUSTICE SOUTER, joined by JUSTICE O'CONNOR and JUSTICE BREYER, concluded that, given the available alternatives, the Board cannot claim that its denial of the Klan's application was a narrowly tailored response necessary to ensure that the State did not appear to take a position on questions of religious belief. Pp. 783–794.

(a) The plurality's *per se* rule would be an exception to the endorsement test, not previously recognized and out of square with this Court's precedents. As the plurality admits, there are some circumstances in which an intelligent observer would reasonably perceive private religious expression in a public forum to imply the government's endorsement of religion. Such perceptions should be attributed to the reasonable observer of Establishment Clause analysis under the Court's decisions, see, *e. g., County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 630, 635–636 (O'CONNOR, J., concurring in part and concurring in judgment), which have looked to the specific circumstances of the private religious speech and the public forum to determine whether there is any realistic danger that such an observer would think that the government was endorsing religion, see, *e. g., Lynch* v. *Donnelly,* 465 U. S. 668, 692, 694 (O'CONNOR, J., concurring). The plurality's *per se* rule would, in all but a handful of cases, make the endorsement test meaningless. Pp. 785–792.

(b) Notwithstanding that there was nothing else on the statehouse lawn suggesting a forum open to any and all private, unattended religious displays, a flat denial of the Klan's application was not the Board's only option to protect against an appearance of endorsement. Either of two possibilities would have been better suited to the requirement that the Board find its most "narrowly drawn" alternative. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45. First, the Board could have required a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross demonstrated governmental endorsement. In the alternative, the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no state endorsement. Pp. 792–794.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined, and an opinion with respect to Part IV, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 770. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER and BREYER, JJ., joined, *post*, p. 772. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR and BREYER, JJ., joined, *post*, p. 783. STEVENS, J., *post*, p. 797, and GINSBURG, J., *post*, p. 817, filed dissenting opinions.

Michael J. Renner argued the cause for petitioners. With him on the briefs were *Betty D. Montgomery*, Attorney General of Ohio, and *Christopher S. Cook*, *Andrew S. Bergman*, *Simon B. Karas*, and *Andrew I. Sutter*, Assistant Attorneys General.

Benson A. Wolman argued the cause for respondents. With him on the brief were *David Goldberger*, *Barbara P. O'Toole*, *Steven R. Shapiro*, and *Peter Joy*.*

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*Briefs of *amici curiae* urging reversal were filed for the Town of Trumbell, Connecticut, et al. by *Arthur A. Hiller*, *Martin B. Margulies*, and *Emanuel Margolis;* for Americans United for Separation of Church and State et al. by *Steven K. Green*, *Julie A. Segal*, *Norman Dorsen*, *Samuel Rabinove*, *Elliot M. Mincberg*, *David Saperstein*, and *Richard T. Cassidy;* for the Council on Religious Freedom et al. by *Lee Boothby*, *Wal-*

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Part IV, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join.

The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment, provides that government "shall make no law respecting an establishment of religion." The question in this case is whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government.

I

Capitol Square is a 10-acre, state-owned plaza surrounding the statehouse in Columbus, Ohio. For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. § 128–4–02(A) (1994) makes the square available "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose," and Ohio Rev. Code Ann. § 105.41 (1994), gives the Capitol Square Review and Advisory Board (Board) responsibility for regulating public access. To use the square, a group must simply fill out an official application

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ter E. Carson, Robert W. Nixon, and *Rolland Truman;* for the Freedom From Religion Foundation, Inc., by *Robert R. Tiernan;* and for the American Jewish Congress et al. by *Marvin E. Frankel, Alan R. Friedman, Richard K. Milin, Marc D. Stern, Lois C. Waldman,* and *Steve Freeman.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law & Justice by *Jay Alan Sekulow, James M. Henderson, Sr.,* and *Keith A. Fournier;* for the Chabad House of Western Michigan, Inc., et al. by *Nathan Lewin;* for the Christian Legal Society by *Thomas C. Berg, Steven T. McFarland, Samuel B. Casey, Gregory S. Baylor,* and *Kimberlee Wood Colby;* for the Knights of Columbus Council 2961 et al. by *Kevin J. Hasson;* and for Liberty Counsel by *Mathew D. Staver.*

form and meet several criteria, which concern primarily safety, sanitation, and noninterference with other uses of the square, and which are neutral as to the speech content of the proposed event. App. 107–110; Ohio Admin. Code Ann. § 128–4–02 (1994).

It has been the Board's policy "to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square." Brief for Petitioners 3–4. Such diverse groups as homosexual rights organizations, the Ku Klux Klan, and the United Way have held rallies. The Board has also permitted a variety of unattended displays on Capitol Square: a state-sponsored lighted tree during the Christmas season, a privately sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival. Although there was some dispute in this litigation regarding the frequency of unattended displays, the District Court found, with ample justification, that there was no policy against them. 844 F. Supp. 1182, 1184 (SD Ohio 1993).

In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from respondent Donnie Carr, an officer of the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993. The Board denied that application on December 3, informing the Klan by letter that the decision to deny "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." App. 47.

Two weeks later, having been unsuccessful in its effort to obtain administrative relief from the Board's decision, the Ohio Klan, through its leader Vincent Pinette, filed the present suit in the United States District Court for the Southern District of Ohio, seeking an injunction requiring the Board to issue the requested permit. The Board defended on the ground that the permit would violate the Establishment Clause. The District Court determined that Capitol Square was a traditional public forum open to all without any policy against freestanding displays; that the Klan's cross was entirely private expression entitled to full First Amendment protection; and that the Board had failed to show that the display of the cross could reasonably be construed as endorsement of Christianity by the State. The District Court issued the injunction and, after the Board's application for an emergency stay was denied, 510 U. S. 1307 (1993) (STEVENS, J., in chambers), the Board permitted the Klan to erect its cross. The Board then received, and granted, several additional applications to erect crosses on Capitol Square during December 1993 and January 1994.

On appeal by the Board, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment. 30 F. 3d 675 (1994). That decision agrees with a ruling by the Eleventh Circuit, *Chabad-Lubavitch* v. *Miller*, 5 F. 3d 1383 (1993), but disagrees with decisions of the Second and Fourth Circuits, *Chabad-Lubavitch* v. *Burlington*, 936 F. 2d 109 (CA2 1991), cert. denied, 505 U. S. 1218 (1992), *Kaplan* v. *Burlington*, 891 F. 2d 1024 (CA2 1989), cert. denied, 496 U. S. 926 (1990), *Smith* v. *County of Albemarle*, 895 F. 2d 953 (CA4), cert. denied, 498 U. S. 823 (1990). We granted certiorari. 513 U. S. 1106 (1995).

II

First, a preliminary matter: Respondents contend that we should treat this as a case in which freedom of speech (the Klan's right to present the message of the cross display) was denied because of the State's disagreement with that message's political content, rather than because of the State's desire to distance itself from sectarian religion. They suggest in their merits brief and in their oral argument that Ohio's genuine reason for disallowing the display was disapproval of the political views of the Ku Klux Klan. Whatever the fact may be, the case was not presented and decided that way. The record facts before us and the opinions below address only the Establishment Clause issue;[1] that is the question upon which we granted certiorari; and that is the sole question before us to decide.

Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981). Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron*, *supra*, at 647, or even acts of worship, *Widmar*, *supra*, at 269, n. 6. Petitioners do not dispute that respondents, in displaying their cross, were engaging in constitutionally protected expression. They do contend that the constitutional protection does not extend to the length of permitting that expression to be made on Capitol Square.

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[1] Respondents claim that the Sixth Circuit's statement that "[z]ealots have First Amendment rights too," even if their views are unpopular, shows that the case is actually about discrimination against political speech. That conclusion is possible only if the statement is ripped from its context, which was this: "The potency of religious speech is not a constitutional infirmity; the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum. Zealots have First Amendment rights too." 30 F. 3d 675, 680 (1994). The court was obviously addressing zealous (and unpopular) *religious* speech.

It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983). The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802–803 (1985). If the former, a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *Perry Ed. Assn., supra,* at 45. These strict standards apply here, since the District Court and the Court of Appeals found that Capitol Square was a traditional public forum. 844 F. Supp., at 1184; 30 F. 3d, at 678.

Petitioners do not claim that their denial of respondents' application was based upon a content-neutral time, place, or manner restriction. To the contrary, they concede—indeed it is the essence of their case—that the Board rejected the display precisely because its content was religious. Petitioners advance a single justification for closing Capitol Square to respondents' cross: the State's interest in avoiding official endorsement of Christianity, as required by the Establishment Clause.

III

There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. See *Lamb's Chapel, supra,* at 394–395; *Widmar, supra,* at 271. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content. *Lamb's Chapel, supra; Widmar, supra.*

In *Lamb's Chapel,* a school district allowed private groups to use school facilities during off-hours for a variety of civic, social, and recreational purposes, excluding, however, religious purposes. We held that even if school property during off-hours was not a public forum, the school district violated an applicant's free-speech rights by denying it use of the facilities solely because of the religious viewpoint of the program it wished to present. 508 U. S., at 390–395. We rejected the district's compelling-state-interest Establishment Clause defense (the same made here) because the school property was open to a wide variety of uses, the district was not directly sponsoring the religious group's activity, and "any benefit to religion or to the Church would have been no more than incidental." *Id.,* at 395. The *Lamb's Chapel* reasoning applies *a fortiori* here, where the property at issue is not a school but a full-fledged public forum.

Lamb's Chapel followed naturally from our decision in *Widmar,* in which we examined a public university's exclusion of student religious groups from facilities available to other student groups. There also we addressed official discrimination against groups who wished to use a "generally open forum" for religious speech. 454 U. S., at 269. And there also the State claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction. We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion. *Id.*, at 274. We stated categorically that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Ibid.*

Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

IV

Petitioners argue that one feature of the present case distinguishes it from *Lamb's Chapel* and *Widmar:* the forum's proximity to the seat of government, which, they contend, may produce the perception that the cross bears the State's approval. They urge us to apply the so-called "endorsement test," see, *e. g., County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573 (1989); *Lynch* v. *Donnelly,* 465 U. S. 668 (1984), and to find that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional.

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950). Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." *Allegheny, supra,* at 593 (citing cases). We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion. See, *e. g., Bowen* v. *Kendrick,* 487 U. S. 589, 608 (1988); *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481, 486–489 (1986); *Mueller* v. *Allen,* 463 U. S. 388 (1983); *McGowan* v. *Maryland,* 366 U. S. 420 (1961). Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself, Lynch, supra,* or else government action alleged to *discriminate in favor* of private religious expression or activity, *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 708–710 (1994); *Allegheny, supra.* The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.

Petitioners rely heavily on *Allegheny* and *Lynch,* but each is easily distinguished. In *Allegheny* we held that the display of a privately sponsored crèche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the county was *favoring* sectarian religious expression. 492 U. S., at 599–600, and n. 50 ("The Grand Staircase does not appear to be the kind of location in which all were free to place their displays"). We expressly distinguished that site from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms, "the presence of the crèche in that location for over six weeks would then *not* serve to associate the government with the crèche." *Ibid.* (emphasis added). In *Lynch* we held that a city's display of a crèche did not violate the Establishment Clause because, in context, the display did not endorse religion. 465 U. S., at 685–687. The opinion does assume, as petitioners contend, that the *government's* use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief. But the case neither holds nor even remotely assumes that the government's neutral treatment of *private* religious expression can be unconstitutional.

Petitioners argue that absence of perceived endorsement was material in *Lamb's Chapel* and *Widmar.* We did state in *Lamb's Chapel* that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," 508 U. S., at 395. But that conclusion was not the result of empirical investigation; it followed directly, we thought, from the fact that the forum was open and the religious activity privately sponsored. See *ibid.* It is significant that we referred only to what would be thought by "the community"—not by outsiders or individual members of the community uninformed about the school's practice. Surely some of the latter, hearing of religious ceremonies on school premises, and not knowing of the premises' availability and use for all sorts of other private activities, *might* leap to the erroneous conclusion of state endorsement. But, we in effect said, given an open forum and private sponsorship, erroneous conclusions do not count. So also in *Widmar.* Once we determined that the benefit to religious groups from the public forum was incidental and shared by other groups, we categorically rejected the State's Establishment Clause defense. 454 U. S., at 274.

What distinguishes *Allegheny* and the dictum in *Lynch* from *Widmar* and *Lamb's Chapel* is the difference between government speech and private speech. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens,* 496 U. S., at 250 (opinion of O'CONNOR, J.).[2] Petitioners assert, in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government. But that, of course, must be merely a subpart of a more general principle: that the distinction disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.* But those situations, which involve governmental *favoritism,* do not exist here. Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none.

The contrary view, most strongly espoused by JUSTICE STEVENS, *post,* at 806–807, but endorsed by JUSTICE SOUTER and JUSTICE O'CONNOR as well, exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 61, 70–71 (1976); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, see *Cohen* v. *California*, 403 U. S. 15, 26 (1971), than to private prayers. This would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.

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[2] This statement in JUSTICE O'CONNOR's *Mergens* opinion is followed by the observation: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U. S., at 250. JUSTICE O'CONNOR today says this observation means that, even when we recognize private speech to be at issue, we must apply the endorsement test. *Post,* at 774–775. But that would cause the second sentence to contradict the first, saying in effect that the "difference between *government* speech . . . and *private* speech" is *not* "crucial."

Since petitioners' "transferred endorsement" principle cannot possibly be restricted to squares in front of state capitols, the Establishment Clause regime that it would usher in is most unappealing. To require (and permit) access by a religious group in *Lamb's Chapel*, it was sufficient that the group's activity was not in fact government sponsored, that the event was open to the public, and that the benefit of the facilities was shared by various organizations. Petitioners' rule would require school districts adopting similar policies in the future to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint. Similarly, state universities would be forced to reassess our statement that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U. S., at 274. Whether it does would henceforth depend upon immediate appearances. Policymakers would find themselves in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other. Every proposed act of private, religious expression in a public forum would force officials to weigh a host of imponderables. How close to government is too close? What kind of building, and in what context, symbolizes state authority? If the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech (a risk not run when the State restrains only its *own* expression).

The "transferred endorsement" test would also disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause. That principle is the basis for the constitutionality of a broad range of laws, not merely those that implicate free-speech issues, see, *e. g., Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986); *Mueller* v. *Allen,* 463 U. S. 388 (1983). It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement.[3]

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[3] If it is true, as JUSTICE O'CONNOR suggests, *post,* at 775, that she would not "be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly," then she is extending the "endorsement test" to private speech to cover an eventuality that is "not likely" to occur. Before doing that, it would seem desirable to explore the precise degree of the unlikelihood (is it perhaps 100%?)—for as we point out in text, the extension to private speech has considerable costs. Contrary to what JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE STEVENS argue, the endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever. The lower federal courts that JUSTICE O'CONNOR's concurrence identifies as having "applied the endorsement test in precisely the context before us today," *ibid.,* have reached precisely *differing* results—which is what led the Court to take this case. And if further proof of the invited chaos

If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such. That would be a content-neutral "manner" restriction that is assuredly constitutional. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.[4]

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is required, one need only follow the debate between the concurrence and JUSTICE STEVENS' dissent as to whether the hypothetical beholder who will be the determinant of "endorsement" should be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or (what JUSTICE STEVENS accuses the concurrence of favoring) the "ultrareasonable" beholder. See *post,* at 778–782 (O'CONNOR, J., concurring in part and concurring in judgment); *post,* at 807–808 (STEVENS, J., dissenting). And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield.

[4] For this reason, among others, we do not inquire into the adequacy of the identification that was attached to the cross ultimately erected in this case. The difficulties posed by such an inquiry, however, are yet another reason to reject the principle of "transferred endorsement." The only principled line for adequacy of identification would be identification that is legible at whatever distance the cross is visible. Otherwise, the uninformed viewer who does not have time or inclination to come closer to read the sign might be misled, just as (under current law) the uninformed viewer who does not have time or inclination to inquire whether speech in Capitol Square is publicly endorsed speech might be misled. Needless to say, such a rule would place considerable constraint upon religious speech, not to mention that it would be ridiculous. But if one rejects that criterion, courts would have to decide (on what basis we cannot imagine) how large an identifying sign is large enough. Our Religion Clause jurisprudence is complex enough without the addition of this highly litigable feature.

* * *

Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, concurring.

I join the Court's conclusion that petitioners' exclusion of the Ku Klux Klan's cross cannot be justified on Establishment Clause grounds. But the fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one.

There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning. Cross burning was entirely unknown to the early Ku Klux Klan, which emerged in some Southern States during Reconstruction. W. Wade, The Fiery Cross: The Ku Klux Klan in America 146 (1987). The practice appears to have been the product of Thomas Dixon, whose book The Clansman formed the story for the movie, The Birth of a Nation. See M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia 145–146 (1991). In the book, cross burning is borrowed from an "old Scottish rite" (Dixon apparently believed that the members of the Reconstruction Ku Klux Klan were the "reincarnated souls of the

Clansmen of Old Scotland") that the Klan uses to celebrate the execution of a former slave. T. Dixon, The Clansman: An Historical Romance of the Ku Klux Klan 324–326 (1905). Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function as an instrument of intimidation. Wade, *supra*, at 185, 279.

To be sure, the cross appears to serve as a religious symbol of Christianity for some Klan members. The hymn "The Old Rugged Cross" is sometimes played during cross burnings. See W. Moore, A Sheet and a Cross: A Symbolic Analysis of the Ku Klux Klan 287–288 (Ph.D. dissertation, Tulane University, 1975). But to the extent that the Klan had a message to communicate in Capitol Square, it was primarily a political one. During his testimony before the District Court, the leader of the local Klan testified that the cross was seen "as a symbol of freedom, as a symbol of trying to unite our people." App. 150. The Klan chapter wished to erect the cross because it was also "a symbol of freedom from tyranny," and because it "was also incorporated in the confederate battle flag." *Ibid.* Of course, the cross also had some religious connotation; the Klan leader linked the cross to what he claimed was one of the central purposes of the Klan: "to establish a Christian government in America." *Id.*, at 142–145. But surely this message was both political and religious in nature.

Although the Klan might have sought to convey a message with some religious component, I think that the Klan had a primarily nonreligious purpose in erecting the cross. The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate. In my mind, this suggests that this case may not have truly involved the Establishment Clause, although I agree with the Court's disposition because of the manner in which the case has come before us. In the end, there may be much less here than meets the eye.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring in part and concurring in the judgment.

I join Parts I, II, and III of the Court's opinion and concur in the judgment. Despite the messages of bigotry and racism that may be conveyed along with religious connotations by the display of a Ku Klux Klan cross, see *ante*, at 771 (THOMAS, J., concurring), at bottom this case must be understood as it has been presented to us—as a case about private religious expression and whether the State's relationship to it violates the Establishment Clause. In my view, "the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols," *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 628 (1989) (O'CONNOR, J., concurring in part and concurring in judgment), even where a neutral state policy toward private religious speech in a public forum is at issue. Accordingly, I see no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context.

For the reasons given by JUSTICE SOUTER, whose opinion I also join, I conclude on the facts of this case that there is "no realistic danger that the community would think that the [State] was endorsing religion or any particular creed," *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 395 (1993), by granting respondents a permit to erect their temporary cross on Capitol Square. I write separately, however, to emphasize that, because it seeks to identify those situations in which government makes "'adherence to a religion relevant . . . to a person's standing in the political community,'" *Allegheny, supra*, at 594 (quoting

Lynch v. *Donnelly*, 465 U. S. 668, 687 (1984) (O'CONNOR, J., concurring), the endorsement test necessarily focuses upon the perception of a reasonable, informed observer.

I

"In recent years, we have paid particularly close attention [in Establishment Clause cases] to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny, supra,* at 592. See also *Lamb's Chapel, supra,* at 395; *School Dist. of Grand Rapids* v. *Ball,* 473 U. S. 373, 390 (1985) (asking "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"). A government statement "'that religion or a particular religious belief is favored or preferred,'" *Allegheny, supra,* at 593 (quoting *Wallace* v. *Jaffree,* 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in judgment), violates the prohibition against establishment of religion because such "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," *Lynch, supra,* at 688 (O'CONNOR, J., concurring). See also *Allegheny, supra,* at 628 (O'CONNOR, J., concurring in part and concurring in judgment); *Wallace, supra,* at 69 (O'CONNOR, J., concurring in judgment). Although "[e]xperience proves that the Establishment Clause . . . cannot easily be reduced to a single test," *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 720 (1994) (O'CONNOR, J., concurring in part and concurring in judgment), the endorsement inquiry captures the fundamental requirement of the Establishment Clause when courts are called upon to evaluate the constitutionality of religious symbols on public property. See *Allegheny, supra,* at 593–594.

While the plurality would limit application of the endorsement test to "expression *by the government itself,* . . . or else government action alleged to *discriminate in favor* of private religious expression or activity," *ante,* at 764, I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism. See *infra,* at 777–778. It is true that neither *Allegheny* nor *Lynch,* our two prior religious display cases, involved the same combination of private religious speech and a public forum that we have before us today. Nonetheless, as JUSTICE SOUTER aptly demonstrates, *post,* at 786–792, we have on several occasions employed an endorsement perspective in Establishment Clause cases where private religious conduct has intersected with a neutral governmental policy providing some benefit in a manner that parallels the instant case. Thus, while I join the discussion of *Lamb's Chapel* and *Widmar* v. *Vincent,* 454 U. S. 263 (1981), in Part III of the Court's opinion, I do so with full recognition that the factors the Court properly identifies ultimately led in each case to the conclusion that there was no endorsement of religion by the State. *Lamb's Chapel, supra,* at 395; *Widmar, supra,* at 274. See also *post,* at 790–791 (SOUTER, J., concurring in part and concurring in judgment).

There is, as the plurality notes, *ante,* at 765, "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens,* 496 U. S. 226, 250 (1990) (plurality opinion). But the quoted statement was made while applying the endorsement test itself; indeed, the sentence upon which the plurality relies was followed immediately by the conclusion that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Ibid.* Thus, as I read the decisions JUSTICE SOUTER carefully surveys, our prior cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue. Moreover, numerous lower courts (including the Court of Appeals in this case) have applied the endorsement test in precisely the context before us today. See, *e. g., Chabad-Lubavitch of Georgia* v. *Miller,* 5 F. 3d 1383 (CA11 1993) (en banc); *Kreisner* v. *San Diego,* 1 F. 3d 775, 782–787 (CA9 1993), cert. denied, 510 U. S. 1044 (1994); *Americans United for Separation of Church and State* v. *Grand Rapids,* 980 F. 2d 1538 (CA6 1992) (en banc); *Doe* v. *Small,* 964 F. 2d 611 (CA7 1992) (en banc); cf. *Smith* v. *County of Albemarle,* 895 F. 2d 953 (CA4), cert. denied, 498 U. S. 823 (1990); *Kaplan* v. *Burlington,* 891 F. 2d 1024 (CA2 1989), cert. denied, 496 U. S. 926 (1990). Given this background, I see no necessity to draw new lines where "[r]eligious expression . . . (1) is purely private and (2) occurs in a traditional or designated public forum," *ante,* at 770.

None of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly. That the religious display at issue here was erected by a private group in a public square available "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose," Ohio Admin. Code Ann. § 128-4-02(A) (1994), certainly informs the Establishment Clause inquiry under the endorsement test. Indeed, many of the factors the plurality identifies are some of those I would consider important in deciding cases like this one where religious speakers seek access to public spaces: "The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Ante,* at 763. And, as I read the plurality opinion, a case is not governed by its proposed *per se* rule where such circumstances are otherwise—that is, where preferential placement of a religious symbol in a public space or government manipulation of the forum is involved. See *ante,* at 766.

To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community. This factor is important because, as JUSTICE SOUTER makes clear, *post,* at 785–786, certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message—particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings. In context, a disclaimer helps remove doubt about state approval of respondents' religious message. Cf. *Widmar, supra,* at 274, n. 14 ("In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members'"). On these facts, then, "the message [of inclusion] is one of neutrality rather than endorsement." *Mergens, supra,* at 248 (plurality opinion).

Our agreement as to the outcome of this case, however, cannot mask the fact that I part company with the plurality on a fundamental point: I disagree that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement." *Ante,* at 768. On the contrary, when the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid. The plurality today takes an exceedingly narrow view of the Establishment Clause that is out of step both with the Court's prior cases and with well-established notions of what the Constitution requires. The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism, see *ante,* at 766; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form.

Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, see *Lynch,* 465 U. S., at 690 (O'CONNOR, J., concurring), the Establishment Clause is violated. This is so not because of " 'transferred endorsement,' " *ante,* at 764, or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. Cf. *Mergens,* 454 U. S., at 275 (concluding that there was no danger of an Establishment Clause violation in a public university's allowing access by student religious groups to facilities available to others "[a]t least in the absence of empirical evidence that religious groups will dominate [the school's] open forum"). Other circumstances may produce the same effect—whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise.

In the end, I would recognize that the Establishment Clause inquiry cannot be distilled into a fixed, *per se* rule. Thus, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U. S., at 694 (O'CONNOR, J., concurring). And this question cannot be answered in the abstract, but instead requires courts to examine the history and administration of a particular practice to determine whether it operates as such an endorsement. I continue to believe that government practices relating to speech on religious topics "must be subjected to careful judicial scrutiny," *ibid.*, and that the endorsement test supplies an appropriate standard for that inquiry.

II

Conducting the review of government action required by the Establishment Clause is always a sensitive matter. Unfortunately, as I noted in *Allegheny*, "even the development of articulable standards and guidelines has not always resulted in agreement among the Members of this Court on the results in individual cases." 492 U. S., at 623. Today, JUSTICE STEVENS reaches a different conclusion regarding whether the Board's decision to allow respondents' display on Capitol Square constituted an impermissible endorsement of the cross' religious message. Yet I believe it is important to note that we have not simply arrived at divergent results after conducting the same analysis. Our fundamental point of departure, it appears, concerns the knowledge that is properly attributed to the test's "reasonable observer [who] evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.*, at 630 (O'CONNOR, J., concurring in part and concurring in judgment). In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by JUSTICE STEVENS.

Because an Establishment Clause violation must be moored in government action of some sort, and because our concern is with the political community writ large, see *Allegheny, supra*, at 627 (O'CONNOR, J., concurring in part and concurring in judgment); *Lynch, supra*, at 690, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe. Indeed, to avoid "entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens," *Allegheny, supra*, at 623 (O'CONNOR, J., concurring in part and concurring in judgment), our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry.

I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. In my view, however, the endorsement test creates a more collective standard to gauge "the 'objective' meaning of the [government's] statement in the community," *Lynch, supra*, at 690 (O'CONNOR, J., concurring). In this respect, the applicable observer is similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984). Thus, "we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Americans United,* 980 F. 2d, at 1544. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent," cf. L. Tribe, American Constitutional Law 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny,* "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." 492 U. S., at 630. Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display. Today's proponents of the endorsement test all agree that we should attribute to the observer knowledge that the cross is a religious symbol, that

Capitol Square is owned by the State, and that the large building nearby is the seat of state government. See *post,* at 792–793 (SOUTER, J., concurring in part and concurring in judgment); *post,* at 806 (STEVENS, J., dissenting). In my view, our hypothetical observer also should know the general history of the place in which the cross is displayed. Indeed, the fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Ohio Statehouse. Cf. *Allegheny, supra,* at 600, n. 50 (noting that "[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time"). This approach does not require us to assume an " 'ultrareasonable observer' who understands the vagaries of this Court's First Amendment jurisprudence," *post,* at 807 (STEVENS, J., dissenting). An informed member of the community will know how the public space in question has been used in the past—and it is that fact, not that the space may meet the legal definition of a public forum, which is relevant to the endorsement inquiry.

JUSTICE STEVENS' property-based argument fails to give sufficient weight to the fact that the cross at issue here was displayed in a forum traditionally open to the public. "The very fact that a sign is installed on public property," his dissent suggests, "implies official recognition and reinforcement of its message." *Post,* at 801. While this may be the case where a government building and its immediate curtilage are involved, it is not necessarily so with respect to those "places which by long tradition or by government fiat have been devoted to assembly and debate, . . . [particularly] streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 45 (1983) (quoting *Hague* v. *Committee for Industrial Organization,* 307

U. S. 496, 515 (1939)). To the extent there is a presumption that "structures on government property—and, in particular, in front of buildings plainly identified with the State—imply state approval of their message," *post,* at 804 (STEVENS, J., dissenting), that presumption can be rebutted where the property at issue is a forum historically available for private expression. The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer.

In this case, I believe, the reasonable observer would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct. It is precisely this type of knowledge that we presumed in *Lamb's Chapel,* 508 U. S., at 395, and in *Mergens,* 496 U. S., at 250 (plurality opinion). Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, see App. to Pet. for Cert. A15–A16; *post,* at 793–794, n. 1 (SOUTER, J., concurring in part and concurring in judgment), and the content of which the Board could have defined as it deemed necessary as a condition of granting the Klan's application. Cf. *American Civil Liberties Union* v. *Wilkinson,* 895 F. 2d 1098, 1104–1106 (CA6 1990). On the facts of this case, therefore, I conclude that the reasonable observer would not interpret the State's tolerance of the Klan's private religious display in Capitol Square as an endorsement of religion.

III

"To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins." *Allegheny,* 492 U. S., at 629 (O'CONNOR, J., concurring in part and concurring in judgment). In my view, however, this flexibility is a virtue and not a vice; "courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch,* 465 U. S., at 694 (O'CONNOR, J., concurring).

I agree that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Ante,* at 761–762. The Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny, supra,* at 593–594 (quoting *Lynch, supra,* at 687 (O'CONNOR, J., concurring)). Because I believe that, under the circumstances at issue here, allowing the Klan cross, along with an adequate disclaimer, to be displayed on Capitol Square presents no danger of doing so, I conclude that the State has not presented a compelling justification for denying respondents their permit.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR and JUSTICE BREYER join, concurring in part and concurring in the judgment.

I concur in Parts I, II, and III of the Court's opinion. I also want to note specifically my agreement with the Court's suggestion that the State of Ohio could ban all unattended private displays in Capitol Square if it so desired. See *ante,* at 761; see also *post,* at 802–804 (STEVENS, J., dissenting). The fact that the capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures. A government entity may ban posters on publicly owned utility poles to eliminate visual clutter, *Members of City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 808 (1984), and may bar camping as part of a demonstration in certain public parks, *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288 (1984). It may similarly adopt a content-neutral policy prohibiting private individuals and groups from erecting unattended displays in forums around public buildings. See *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [that] the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information,'" quoting *Clark, supra,* at 293).

Otherwise, however, I limit my concurrence to the judgment. Although I agree in the end that, in the circumstances of this case, petitioners erred in denying the Klan's application for a permit to erect a cross on Capitol Square, my analysis of the Establishment Clause issue differs from JUSTICE SCALIA's, and I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.

The plurality's opinion declines to apply the endorsement test to the Board's action, in favor of a *per se* rule: religious expression cannot violate the Establishment Clause where it (1) is private and (2) occurs in a public forum, even if a reasonable observer would see the expression as indicating state endorsement. *Ante,* at 770. This *per se* rule would be an exception to the endorsement test, not previously recognized and out of square with our precedents.

I

My disagreement with the plurality on the law may receive some focus from attention to a matter of straight fact that we see alike: in some circumstances an intelligent observer may mistake private, unattended religious displays in a public forum for government speech endorsing religion. See *ante*, at 768 (acknowledging that "hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement") (emphasis in original); see also *ante*, at 769, n. 4 (noting that an observer might be "misled" by the presence of the cross in Capitol Square if the disclaimer was of insufficient size or if the observer failed to enquire whether the State had sponsored the cross). The Klan concedes this possibility as well, saying that, in its view, "on a different set of facts, the government might be found guilty of violating the endorsement test by permitting a private religious display in a public forum." Brief for Respondents 43.

An observer need not be "obtuse," *Doe* v. *Small*, 964 F. 2d 611, 630 (CA7 1992) (Easterbrook, J., concurring), to presume that an unattended display on government land in a place of prominence in front of a government building either belongs to the government, represents government speech, or enjoys its location because of government endorsement of its message. Capitol Square, for example, is the site of a number of unattended displays owned or sponsored by the government, some permanent (statues), some temporary (such as the Christmas tree and a "Seasons Greetings" banner), and some in between (flags, which are, presumably, taken down and put up from time to time). See App. 59, 64–65 (photos); Appendices A and B to this opinion, *infra*. Given the domination of the square by the government's own displays, one would not be a dimwit as a matter of law to think that an unattended religious display there was endorsed by the government, even though the square has also been the site of three privately sponsored, unattended displays over the years (a menorah, a United Way "thermometer," and some artisans' booths left overnight during an arts festival), *ante,* at 758, cf. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 600, n. 50 (1989) ("Even if the Grand Staircase occasionally was used for displays other than the crèche . . . , it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government"), and even though the square meets the legal definition of a public forum and has been used "[f]or over a century" as the site of "speeches, gatherings, and festivals," *ante,* at 757. When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.

In sum, I do not understand that I am at odds with the plurality when I assume that in some circumstances an intelligent observer would reasonably perceive private religious expression in a public forum to imply the government's endorsement of religion. My disagreement with the plurality is simply that I would attribute these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis under our precedents, where I believe that such reasonable perceptions matter.

II

In *Allegheny,* the Court alluded to two elements of the analytical framework supplied by *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), by asking "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." 492 U. S., at 592. We said that "the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred,'" *id.,* at 593, quoting *Wallace* v. *Jaf-*

free, 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in judgment) (emphasis deleted), and held that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," 492 U. S., at 593–594.

Allegheny's endorsement test cannot be dismissed, as JUSTICE SCALIA suggests, as applying only to situations in which there is an allegation that the Establishment Clause has been violated through "expression by the government itself" or "government action . . . discriminat[ing] in favor of private religious expression." *Ante*, at 764 (emphasis deleted). Such a distinction would, in all but a handful of cases, make meaningless the "effect-of-endorsing" part of *Allegheny*'s test. Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer. See *Allegheny*, *supra*, at 630, 635–636 (O'CONNOR, J., concurring in part and concurring in judgment); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 493 (1986) (O'CONNOR, J., concurring in part and concurring in judgment); see also *Allegheny*, *supra*, at 593–594, 599–600 (majority opinion); *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring). If a reasonable observer would perceive a religious display in a government forum as government speech endorsing religion, then the display has made "religion relevant, in . . . public perception, to status in the political community." *Id.*, at 692 (O'CONNOR, J., concurring). Unless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize a public perception of endorsement as a harm only in that subclass of cases in which the government owns the display. Indeed, the Court stated in *Allegheny* that "once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined." 492 U. S., at 612. Notably, we did not say that it was only a "particular government proclamation" that could have such an unconstitutional effect, nor does the passage imply anything of the kind.

The significance of the fact that the Court in *Allegheny* did not intend to lay down a *per se* rule in the way suggested by the plurality today has been confirmed by subsequent cases. In *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990), six Justices applied the endorsement test to decide whether the Establishment Clause would be violated by a public high school's application of the Equal Access Act, Pub. L. 98–377, 98 Stat. 1302, 20 U. S. C. §§ 4071–4074, to allow students to form a religious club having the same access to meeting facilities as other "noncurricular" groups organized by students. A plurality of four Justices concluded that such an equal access policy "does not convey a message of state approval or endorsement of the particular religion" espoused by the student religious group. 496 U. S., at 252 (O'CONNOR, J., joined by REHNQUIST, C. J., and White and Blackmun, JJ.). Two others concurred in the judgment in order "to emphasize the steps [the school] must take to avoid appearing to endorse the [religious] club's goals." *Id.*, at 263 (opinion of Marshall, J., joined by Brennan, J.); see also *id.*, at 264 ("If public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause") (emphasis in original).

What is important is that, even though *Mergens* involved private religious speech in a nondiscriminatory "'limited open forum,'" *id.*, at 233, 247, a majority of the Court reached the conclusion in the case not by applying an irrebuttable presumption, as the plurality does today, but by making a contextual judgment taking account of the circumstances of the specific case. See *id.*, at 250–252 (plurality opinion); *id.*, at 264–270 (opinion of Marshall, J., joined by Brennan, J.); cf. *Allegheny*, 492 U. S., at 629 (O'CONNOR, J., concurring in part and concurring in judgment) ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice"); *Lynch, supra*, at 694 (O'CONNOR, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"). The *Mergens* plurality considered the nature of the likely audience, 496 U. S., at 250 ("[S]econdary school students are mature enough . . . to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis"); the details of the particular forum, *id.*, at 252 (noting "the broad spectrum of officially recognized student clubs" at the school, and the students' freedom "to initiate and organize additional student clubs"); the presumptively secular nature of most student organizations, *ibid.* ("'[I]n the absence of empirical evidence that religious groups will dominate [the] . . . open forum, . . . the advancement of religion would not be the forum's "primary effect,"'" quoting *Widmar* v. *Vincent*, 454 U. S. 263, 275 (1981)); and the school's specific action or inaction that would disassociate itself from any religious message, 496 U. S., at 251 ("[N]o school officials actively participate" in the religious group's activities). The plurality, moreover, expressly relied on the fact that the school could issue a disclaimer specific to the religious group, concluding that "[t]o the extent a school makes clear that its recognition of [a religious student group] is not an endorsement . . . , students will reasonably understand that the . . . recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." *Ibid.;* see also *id.*, at 270 (Marshall, J., concurring in judgment) (noting importance of schools "taking whatever further steps are necessary to make clear that their recognition of a religious club does not reflect their endorsement of the views of the club's participants").

Similarly, in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), we held that an evangelical church, wanting to use public school property to show a series of films about child rearing with a religious perspective, could not be refused access to the premises under a policy that would open the school to other groups showing similar films from a nonreligious perspective. In reaching this conclusion, we expressly concluded that the policy would "not have the principal or primary effect of advancing or inhibiting religion." 508 U. S., at 395. Again we looked to the specific circumstances of the private religious speech and the public forum: the film would not be shown during school hours or be sponsored by the school, it would be open to the public, and the forum had been used "repeatedly" by "a wide variety" of other private speakers. *Ibid.* "Under these circumstances," we concluded, "there would have been no realistic danger that the community would think that the [school] was endorsing religion." *Ibid.* We thus expressly looked to the endorsement effects of the private religious speech at issue, notwithstanding the fact that there was no allegation that the Establishment Clause had been violated through active "expression by the government itself" or affirmative "government action . . . discriminat[ing] in favor of private religious expression." *Ante,* at 764 (emphasis deleted). Indeed, the issue of whether the private religious speech in a government forum had the effect of advancing religion was central, rather than irrelevant, to our Establishment Clause enquiry. This is why I agree with the Court that "[t]he *Lamb's Chapel* reasoning applies *a fortiori* here," *ante,* at 762.

Widmar v. *Vincent, supra,* is not to the contrary. Although *Widmar* was decided before our adoption of the endorsement test in *Allegheny,* its reasoning fits with such a test and not with the *per se* rule announced today. There, in determining whether it would violate the Establishment

Clause to allow private religious speech in a "generally open forum" at a university, 454 U. S., at 269, the Court looked to the *Lemon* test, 454 U. S., at 271, and focused on the "effects" prong, *id.*, at 272, in reaching a contextual judgment. It was relevant that university students "should be able to appreciate that the University's policy is one of neutrality toward religion," that students were unlikely, as a matter of fact, to "draw any reasonable inference of University support from the mere fact of a campus meeting place," and that the University's student handbook carried a disclaimer that the University should not "'be identified in any way with the . . . opinions of any [student] organization.'" *Id.*, at 274, n. 14. "In this context," *id.*, at 273, and in the "absence of empirical evidence that religious groups [would] dominate [the] open forum," *id.*, at 275, the Court found that the forum at issue did not "confer any imprimatur of state approval on religious sects or practices," *id.*, at 274.

Even if precedent and practice were otherwise, however, and there were an open question about applying the endorsement test to private speech in public forums, I would apply it in preference to the plurality's view, which creates a serious loophole in the protection provided by the endorsement test. In JUSTICE SCALIA's view, as I understand it, the Establishment Clause is violated in a public forum only when the government itself intentionally endorses religion or willfully "foster[s]" a misperception of endorsement in the forum, *ante*, at 766, or when it "manipulates" the public forum "in such a manner that only certain religious groups take advantage of it," *ibid.* If the list of forbidden acts is truly this short, then governmental bodies and officials are left with generous scope to encourage a multiplicity of religious speakers to erect displays in public forums. As long as the governmental entity does not "manipulat[e]" the forum in such a way as to exclude all other speech, the plurality's opinion would seem to invite such government encouragement, even when the result will be the domination of the forum by religious displays and religious speakers. By allowing government to encourage what it cannot do on its own, the proposed *per se* rule would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself.

Something of the sort, in fact, may have happened here. Immediately after the District Court issued the injunction ordering petitioners to grant the Klan's permit, a local church council applied for a permit, apparently for the purpose of overwhelming the Klan's cross with other crosses. The council proposed to invite all local churches to erect crosses, and the Board granted "blanket permission" for "all churches friendly to or affiliated with" the council to do so. See Brief in Opposition RA24–RA26. The end result was that a part of the square was strewn with crosses, see Appendices A and B to this opinion, *infra,* at 795–796, and while the effect in this case may have provided more embarrassment than suspicion of endorsement, the opportunity for the latter is clear.

III

As for the specifics of this case, one must admit that a number of facts known to the Board, or reasonably anticipated, weighed in favor of upholding its denial of the permit. For example, the Latin cross the Klan sought to erect is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point. It was displayed immediately in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statues close at hand. For much of the time the cross was supposed to stand on the square, it would have been the only private display on the public plot (the menorah's permit expired several days before the cross actually went up). See Pet. for Cert. A15–A16, A31; 30 F. 3d, at 677. There was nothing else on the statehouse lawn that would have suggested a forum open to any and all private, unattended religious displays.

Based on these and other factors, the Board was understandably concerned about a possible Establishment Clause violation if it had granted the permit. But a flat denial of the Klan's application was not the Board's only option to protect against an appearance of endorsement, and the Board was required to find its most "narrowly drawn" alternative, *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); see also *ante*, at 761. Either of two possibilities would have been better suited to this situation. In support of the Klan's application, its representative stated in a letter to the Board that the cross would be accompanied by a disclaimer, legible "from a distance," explaining that the cross was erected by private individuals "'without government support.'" App. 118. The letter said that "the contents of the sign" were "open to negotiation." *Ibid.*[1] The

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[1] This description of the disclaimer, as well as the agreement to negotiate, also appeared in the Klan's District Court complaint, App. 26, and in stipulations of fact jointly filed in the District Court by both parties, *id.*, at 100, ¶ 32. The Klan conceded before the District Court that "the state could have required . . . a disclaimer" like the one proposed, Memorandum in Support of Temporary Restraining Order and Preliminary Injunction in No. C2–93–1162 (SD Ohio), p. 5, and the State assumed throughout the litigation that the display would include the disclaimer, see, *e. g.*, Memorandum of Defendants in Opposition to Plaintiffs's Motion for Temporary Restraining Order and for Preliminary Injunction in No. C2–93–1162 (SD Ohio), pp. 6, 21. Both parties considered the disclaimer as an integral part of the display that the Klan desired to place on Capitol Square. Thus the District Court's order, which did not expressly require the disclaimer in awarding the injunction, see Pet. for Cert. A26 ("Plaintiffs are entitled to an injunction requiring the defendants to issue a permit to erect a cross on Capitol Square"), cannot reasonably be read to mean that the disclaimer was unnecessary. Indeed, in both its findings of fact and conclusions of law, the District Court discussed the presence and importance of the disclaimer, see *id.*, at A15–A16 (findings of fact), A20, A22–A23 (conclusions of law), and the Klan itself understood that the District Court's order was

Board, then, could have granted the application subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross was there to "demonstrat[e] the government's allegiance to, or endorsement of, the Christian faith." *Allegheny*, 492 U. S., at 612.[2] In the alternative, the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.

With such alternatives available, the Board cannot claim that its flat denial was a narrowly tailored response to the Klan's permit application and thus cannot rely on that denial as necessary to ensure that the State did not "appea[r] to take a position on questions of religious belief." *Id.*, at 594. For these reasons, I concur in the judgment.

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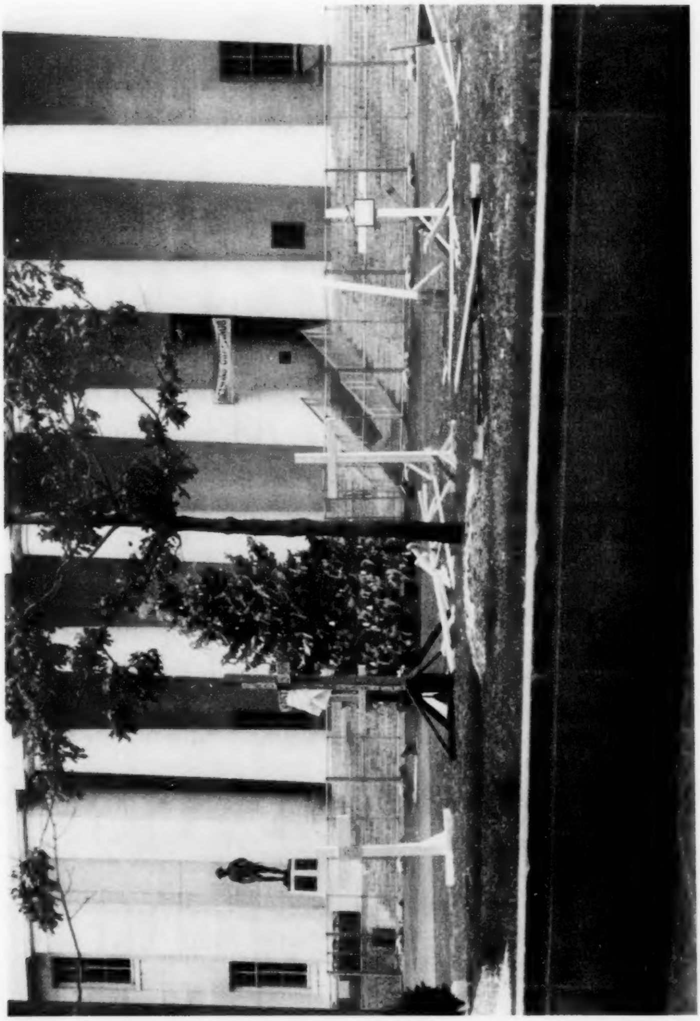
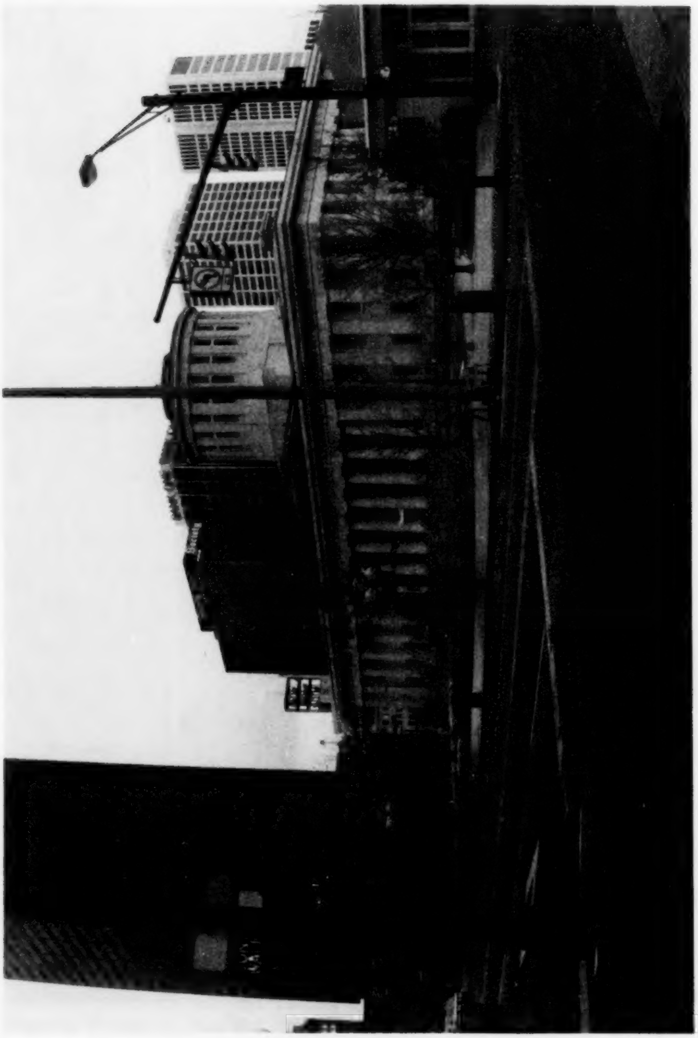
based on the assumption that a disclaimer would accompany the cross, since the cross the Klan put up on the basis of the District Court's command in fact carried a disclaimer, see App. 63 (photo); Appendix to opinion of STEVENS, J., *post*, at 816. Since the litigation preceded the appearance of the cross and the sign, the adequacy of the sign actually produced was not considered. The adequacy of a disclaimer, in size as well as content, is, of course, a proper subject of judicial scrutiny when placed in issue. Whether the flimsy cardboard sign attached by the Klan to the base of the cross functioned as an adequate disclaimer in this case is a question not before us.

[2] Of course, the presence of a disclaimer does not always remove the possibility that a private religious display "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred," *Allegheny*, 492 U. S., at 593 (emphasis, internal quotation marks, and citation omitted), when other indicia of endorsement (*e. g.*, objective indications that the government in fact invited the display or otherwise intended to further a religious purpose) outweigh the mitigating effect of the disclaimer, or when the disclaimer itself does not sufficiently disclaim government support. See, *e. g.*, *Stone* v. *Graham*, 449 U. S. 39, 41 (1980); *Allegheny*, *supra*, at 600–601; cf. *ante*, at 769, n. 4. In this case, however, there is no reason to presume that an adequate disclaimer could not have been drafted. Cf. Parish, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253, 285–287 (1994).

APPENDIX A TO OPINION OF SOUTER, J.



APPENDIX B TO OPINION OF SOUTER, J.



JUSTICE STEVENS, dissenting.

The Establishment Clause should be construed to create a strong presumption against the installation of unattended religious symbols on public property. Although the State of Ohio has allowed Capitol Square, the area around the seat of its government, to be used as a public forum, and although it has occasionally allowed private groups to erect other sectarian displays there, neither fact provides a sufficient basis for rebutting that presumption. On the contrary, the sequence of sectarian displays disclosed by the record in this case illustrates the importance of rebuilding the "wall of separation between church and State" that Jefferson envisioned.[1]

I

At issue in this case is an unadorned Latin cross, which the Ku Klux Klan placed, and left unattended, on the lawn in front of the Ohio State Capitol. The Court decides this case on the assumption that the cross was a religious symbol. I agree with that assumption notwithstanding the hybrid character of this particular object. The record indicates that the "Grand Titan of the Knights of the Ku Klux Klan for the Realm of Ohio" applied for a permit to place a cross in front of the state capitol because " 'the Jews' " were placing a "symbol for the Jewish belief" in the square. App. 173.[2] Some observers, unaware of who had sponsored the cross, or unfamiliar with the history of the Klan and its reaction to the menorah, might interpret the Klan's cross as an inspirational symbol of the crucifixion and resurrection of Jesus Christ.

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[1] See *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879).

[2] The "Grand Titan" apparently was referring to a menorah that a private group placed in the square during the season of Chanukah. App. 98; see *infra*, at 808–809. The Klan found the menorah offensive. The Klan's cross, in turn, offended a number of observers. It was vandalized the day after it was erected, and a local church group applied for, and was granted, permission to display its own crosses around the Klan's to protest the latter's presence. See Record 31.

More knowledgeable observers might regard it, given the context, as an antisemitic symbol of bigotry and disrespect for a particular religious sect. Under the first interpretation, the cross is plainly a religious symbol.[3] Under the second, an icon of intolerance expressing an anticlerical message should also be treated as a religious symbol because the Establishment Clause must prohibit official sponsorship of irreligious as well as religious messages. See *Wallace* v. *Jaffree,* 472 U. S. 38, 52 (1985). This principle is no less binding if the antireligious message is also a bigoted message. See *United States* v. *Ballard,* 322 U. S. 78, 86–89 (1944) (government lacks power to judge truth of religious beliefs); *Watson* v. *Jones,* 13 Wall. 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect").

Thus, while this unattended, freestanding wooden cross was unquestionably a religious symbol, observers may well have received completely different messages from that symbol. Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion—a statehouse sign calling powerfully to mind their outsider status. In any event, it was a message that the State of Ohio may not communicate to its citizens without violating the Establishment Clause.

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[3] Indeed, the Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity. See *American Civil Liberties Union* v. *St. Charles,* 794 F. 2d 265, 271 (CA7 1986) ("Such a display is not only religious but also sectarian. This is not just because some religious Americans are not Christians. Some Protestant sects still do not display the cross . . . . The Greek Orthodox church uses as its symbol the Greek (equilateral) cross, not the Latin cross. . . . [T]he more sectarian the display, the closer it is to the original targets of the [establishment] clause, so the more strictly is the clause applied").

II

The plurality does not disagree with the proposition that the State may not espouse a religious message. *Ante,* at 765–766. It concludes, however, that the State has not sent such a message; it has merely allowed others to do so on its property. Thus, the State has provided an "incidental benefit" to religion by allowing private parties access to a traditional public forum. See *ante,* at 765. In my judgment, neither precedent nor respect for the values protected by the Establishment Clause justifies that conclusion.

The Establishment Clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 593–594 (1989), quoting *Lynch* v. *Donnelly,* 465 U. S. 668, 687 (1984) (O'CONNOR, J., concurring). At least when religious symbols are involved, the question whether the State is "appearing to take a position" is best judged from the standpoint of a "reasonable observer."[4] It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. *Ibid.* If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.[5]

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[4] In *Allegheny,* five Justices found the likely reaction of a "'reasonable observer'" relevant for purposes of determining whether an endorsement was present. 492 U. S., at 620 (opinion of Blackmun, J.); *id.,* at 635–636 (opinion of O'CONNOR, J.); *id.,* at 642–643 (opinion of Brennan, J., joined by Marshall and STEVENS, JJ.).

In determining whether the State's maintenance of the Klan's cross in front of the statehouse conveyed a forbidden message of endorsement, we should be mindful of the power of a symbol standing alone and unexplained. Even on private property, signs and symbols are generally understood to express the owner's views. The location of the sign is a significant component of the message it conveys.

> "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advo-

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[5] JUSTICE O'CONNOR agrees that an "endorsement test" is appropriate and that we should judge endorsement from the standpoint of a reasonable observer. *Ante,* at 779. But her reasonable observer is a legal fiction, "'a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Ante,* at 780. The ideal human JUSTICE O'CONNOR describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "'ideal'" standard. Instead of protecting only the "'ideal'" observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.

JUSTICE O'CONNOR's argument that "[t]here is always *someone*" who will feel excluded by any particular governmental action, *ibid.*, ignores the requirement that such an apprehension be objectively reasonable. A person who views an exotic cow at the zoo as a symbol of the government's approval of the Hindu religion cannot survive this test.

> cating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *City of Ladue* v. *Gilleo,* 512 U. S. 43, 56–57 (1994) (footnote omitted).

Like other speakers, a person who places a sign on her own property has the autonomy to choose the content of her own message. Cf. *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334, 341–342 (1995). Thus, the location of a stationary, unattended sign generally is both a component of its message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location.[6]

So it is with signs and symbols left to speak for themselves on public property. The very fact that a sign is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself. The "reasonable observer" of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message.

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[6] I recognize there may be exceptions to this general rule. A commercial message displayed on a billboard, for example, usually will not be taken to represent the views of the billboard's owner because every reasonable observer is aware that billboards are rented as advertising space. On the other hand, the observer may reasonably infer that the owner of the billboard is not inalterably opposed to the message presented thereon; for the owner has the right to exclude messages with which he disagrees, and he might be expected to exercise that right if his disagreement is sufficiently profound.

That the State may have granted a variety of groups permission to engage in uncensored expressive activities in front of the capitol building does not, in my opinion, qualify or contradict the normal inference of endorsement that the reasonable observer would draw from the unattended, freestanding sign or symbol. Indeed, parades and demonstrations at or near the seat of government are often exercises of the right of the people to petition their government for a redress of grievances—exercises in which the government is the recipient of the message rather than the messenger. Even when a demonstration or parade is not directed against government policy, but merely has made use of a particularly visible forum in order to reach as wide an audience as possible, there usually can be no mistake about the identity of the messengers as persons other than the State. But when a statue or some other freestanding, silent, unattended, immoveable structure—regardless of its particular message—appears on the lawn of the capitol building, the reasonable observer must identify the State either as the messenger, or, at the very least, as one who has endorsed the message. Contrast, in this light, the image of the cross standing alone and unattended, see *infra*, at 816, and the image the observer would take away were a hooded Klansman holding, or standing next to, the very same cross.

This Court has never held that a private party has a right to place an unattended object in a public forum.[7] Today the

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[7] Despite the absence of any holding on this point, JUSTICE O'CONNOR assumes that a reasonable observer would not impute the content of an unattended display to the government because that observer would know that the State is required to allow all such displays on Capitol Square. *Ante*, at 780–781. JUSTICE O'CONNOR thus presumes a reasonable observer so prescient as to understand legal doctrines that this Court has not yet adopted.

Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum, *ante*, at 761. This is true despite the fact that our cases have condemned a number of laws that foreclose an entire medium of expression, even in places where free speech is otherwise allowed.[8] The First Amendment affords protection to a basic liberty: "the freedom of speech" that an individual may exercise when using the public streets and parks. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.). The Amendment, however, does not destroy all property rights. In particular, it does not empower individuals to erect structures of any kind on public property. *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 814 (1984);[9] see also

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[8] "Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell* v. *Griffin*, 303 U. S. 444, 451–452 (1938); handbills on the public streets, *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943); the door-to-door distribution of literature, *Martin* v. *Struthers*, 319 U. S. 141, 145–149 (1943); *Schneider* v. *State*, 308 U. S. 147, 164–165 (1939), and live entertainment, *Schad* v. *Mount Ephraim*, 452 U. S. 61, 75–76 (1981). See also *Frisby* v. *Schultz*, 487 U. S. 474, 486 (1988) (picketing focused upon individual residence is 'fundamentally different from more generally directed means of communication that may not be completely banned in residential areas'). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 55 (1994) (footnote omitted).

[9] In *Vincent*, we stated:

"Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that 'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.' *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 129

Clark v. *Community for Creative Non-Violence,* 468 U. S. 288 (1984). Thus, our cases protecting the individual's freedom to engage in communicative conduct on public property (whether by speaking, parading, handbilling, waving a flag, or carrying a banner), *e. g., Lovell* v. *City of Griffin,* 303 U. S. 444 (1938), or to send messages from her own property by placing a sign in the window of her home, *City of Ladue* v. *Gilleo,* 512 U. S., at 58–59, do not establish the right to implant a physical structure (whether a campaign poster, a burning cross, or a statue of Elvis Presley) on public property. I think the latter "right," which creates a far greater intrusion on government property and interferes with the government's ability to differentiate its own message from those of public individuals, does not exist.[10]

Because structures on government property—and, in particular, in front of buildings plainly identified with the State—imply state approval of their message, the government must have considerable leeway, outside of the religious arena, to choose what kinds of displays it will allow and what kinds it will not. Although the First Amendment requires the government to allow leafletting or demonstrating outside its buildings, the State has greater power to exclude unattended symbols when they convey a type of message with which the State does not wish to be identified. I think it obvious, for example, that Ohio could prohibit certain categories of signs or symbols in Capitol Square—erotic exhibits, commercial advertising, and perhaps campaign posters as

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(1981). Rather, the 'existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.' *Perry Education Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 44 (1983)." 466 U. S., at 814.

[10] At least, it does not exist as a general matter. I recognize there may be cases of viewpoint discrimination (say, if the State were to allow campaign signs supporting an incumbent governor but not signs supporting his opponent) in which access cannot be discriminatorily denied.

well—without violating the Free Speech Clause.[11] Moreover, our "public forum" cases do not foreclose public entities from enforcing prohibitions against all unattended displays in public parks, or possibly even limiting the use of such displays to the communication of noncontroversial messages.[12] Such a limitation would not inhibit any of the traditional forms of expression that have been given full constitutional protection in public fora.

The State's general power to restrict the types of unattended displays does not alone suffice to decide this case, because Ohio did not profess to be exercising any such authority. Instead, the Capitol Square Review Board denied a permit for the cross because it believed the Establishment Clause required as much, and we cannot know whether the

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[11] The plurality incorrectly assumes that a decision to exclude a category of speech from an inappropriate forum must rest on a judgment about the value of that speech. See *ante*, at 766–767. Yet, we have upheld the exclusion of all political signs from public vehicles, *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974), though political expression is at the heart of the protection afforded by the First Amendment. *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 346–347 (1995). A view that "private prayers," *ante*, at 767, are most appropriate in private settings is neither novel nor disrespectful to religious speech.

[12] Several scholars have commented on the malleability of our public forum precedents.

"As [an] overview of the cases strongly suggests, whether or not a given place is deemed a 'public forum' is ordinarily less significant than the nature of the speech restriction—despite the Court's rhetoric. Indeed, even the rhetoric at times reveals as much.

. . . . .

"Beyond confusing the issues, an excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others." L. Tribe, American Constitutional Law 992–993 (2d ed. 1988) (footnotes omitted).

See also Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1221–1222 (1984).

Board would have denied the permit on other grounds. App. 91–92, 169. Accordingly, we must evaluate the State's rationale on its own terms. But in this case, the endorsement inquiry under the Establishment Clause follows from the State's power to exclude unattended private displays from public property. Just as the Constitution recognizes the State's interest in preventing its property from being used as a conduit for ideas it does not wish to give the appearance of ratifying, the Establishment Clause prohibits government from allowing, and thus endorsing, unattended displays that take a position on a religious issue. If the State allows such stationary displays in front of its seat of government, viewers will reasonably assume that it approves of them. As the picture appended to this opinion demonstrates, *infra*, at 816, a reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself.[13]

When the message is religious in character, it is a message the State can neither send nor reinforce without violating the Establishment Clause. Accordingly, I would hold that the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government.

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[13] Indeed, I do not think *any* disclaimer could dispel the message of endorsement in this case. Capitol Square's location in downtown Columbus, Ohio, makes it inevitable that countless motorists and pedestrians would immediately perceive the proximity of the cross to the capitol without necessarily noticing any disclaimer of public sponsorship. The plurality thus correctly abjures inquiry into the possible adequacy or significance of a legend identifying the owner of the cross. See *ante*, at 769, n. 4. JUSTICE SOUTER is of the view that an adequate disclaimer is constitutionally required, *ante*, at 793–794, but he does not suggest that the attachment to the Klan's cross in this case was adequate.

III

The Court correctly acknowledges that the State's duty to avoid a violation of the Establishment Clause can justify a content-based restriction on speech or expression, even when that restriction would otherwise be prohibited by the Free Speech Clause. *Ante,* at 761–762; *ante,* at 783 (opinion of O'CONNOR, J.). The plurality asserts, however, that government cannot be perceived to be endorsing a religious display when it merely accords that display "the same access to a public forum that all other displays enjoy." *Ante,* at 764. I find this argument unpersuasive.

The existence of a "public forum" in itself cannot dispel the message of endorsement. A contrary argument would assume an "ultrareasonable observer" who understands the vagaries of this Court's First Amendment jurisprudence. I think it presumptuous to consider such knowledge a precondition of Establishment Clause protection. Many (probably most) reasonable people do not know the difference between a "public forum," a "limited public forum," and a "nonpublic forum." They *do* know the difference between a state capitol and a church. Reasonable people have differing degrees of knowledge; that does not make them "'obtuse,'" see 30 F. 3d 675, 679 (CA6 1994) (quoting *Doe* v. *Small,* 964 F. 2d 611, 630 (CA7 1992) (Easterbrook, J., concurring)); nor does it make them unworthy of constitutional protection. It merely makes them human. For a religious display to violate the Establishment Clause, I think it is enough that *some* reasonable observers would attribute a religious message to the State.

The plurality appears to rely on the history of this particular public forum—specifically, it emphasizes that Ohio has in the past allowed three other private unattended displays. Even if the State could not reasonably have been understood to endorse the prior displays, I would not find this argument convincing, because it assumes that all reasonable viewers know all about the history of Capitol Square—a highly unlikely supposition.[14] But the plurality's argument fails on its own terms, because each of the three previous displays conveyed the same message of approval and endorsement that this one does.

Most significant, of course, is the menorah that stood in Capitol Square during Chanukah. The display of that religious symbol should be governed by the same rule as the display of the cross.[15] In my opinion, both displays are equally objectionable. Moreover, the fact that the State has placed its stamp of approval on two different religions instead of one only compounds the constitutional violation. The Establishment Clause does not merely prohibit the State from favoring one religious sect over others. It also proscribes state action supporting the establishment of a number of religions,[16] as well as the official endorsement of religion in preference to nonreligion. *Wallace* v. *Jaffree*, 472 U. S., at 52–55. The State's prior approval of the pro-religious message conveyed by the menorah is fully consistent with its endorsement of one of the messages conveyed by the cross: "The State of Ohio favors religion over irreligion." This message is incompatible with the principles embodied by our Establishment Clause.

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[14] JUSTICE O'CONNOR apparently would not extend Establishment Clause protection to passersby who are unaware of Capitol Square's history. See *ante,* at 780–782. Thus, she sees no reason to distinguish an intimate knowledge of the square's history from the knowledge that a cross is a religious symbol or that the statehouse is the statehouse. *Ante,* at 780–781. But passersby, including schoolchildren, traveling salesmen, and tourists as much as those who live next to the statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion.

[15] A fragmented Court reached a different conclusion in *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573 (1989). In that case, a majority of this Court decided that a crèche placed by a private group inside a public building violated the Establishment Clause, *id.,* at 598–602, but that a menorah placed alongside a Christmas tree and a "sign saluting liberty" outside that same building did not. *Id.,* at 613–621 (opinion of Blackmun, J.); *id.,* at 632–637 (opinion of O'CONNOR, J.); *id.,* at 663–667 (opinion of KENNEDY, J., joined by REHNQUIST, C. J., and White and SCALIA, JJ.). The two Justices who provided the decisive votes to distinguish these situations relied on the presence of the tree and the sign to find that the menorah, in context, was not a religious, but a secular, symbol of liberty. *Id.,* at 613–621 (opinion of Blackmun, J.); *id.,* at 632–637 (opinion of O'CONNOR, J.). It was apparently in reliance on the outcome of the *Allegheny* case that Ohio believed it could provide a forum for the menorah (which appeared in Capitol Square with a state-owned Christmas tree and a banner reading, "Season's Greetings") and yet could not provide one for the cross. See App. 169. Given the state of the law at the time, Ohio's decision was hardly unreasonable; but I cannot support a view of the Establishment Clause that permits a State effectively to endorse some kinds of religious symbols but not others. I

The record identifies two other examples of freestanding displays that the State previously permitted in Capitol Square: a "United Way Campaign 'thermometer,'" and "craftsmen's booths and displays erected during an Arts Festival."[17] App. to Pet. for Cert. A16. Both of those examples confirm the proposition that a reasonable observer should infer official approval of the message conveyed by a structure erected in front of the statehouse. Surely the thermometer suggested that the State was encouraging passersby to contribute to the United Way. It seems equally clear that the State was endorsing the creativity of artisans and craftsmen by permitting their booths to occupy a part of the square. Nothing about either of those freestanding displays contradicts the normal inference that the State has endorsed whatever message might be conveyed by permit-

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would find that the State is powerless to place, or allow to be placed, any religious symbol—including a menorah or a cross—in front of its seat of government.

[16] See *Allegheny*, 492 U. S., at 647–649 (STEVENS, J., dissenting).

[17] The booths were attended during the festival itself, but were left standing overnight during the pendency of the event. App. 159.

ting an unattended symbol to adorn the capitol grounds.[18] Accordingly, the fact that the menorah, and later the cross, stood in an area available " 'for free discussion of public questions, or for activities of a broad public purpose,' " Ohio Rev. Code Ann. § 105.41 (1994), quoted *ante,* at 757, is fully consistent with the conclusion that the State sponsored those religious symbols. They, like the thermometer and the booths, were displayed in a context that connotes state approval.

This case is therefore readily distinguishable from *Widmar* v. *Vincent,* 454 U. S. 263 (1981), and *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384 (1993). In both of those cases, as we made perfectly clear, there was no danger of incorrect identification of the speakers and no basis for inferring that their messages had been endorsed by any public entity. As we explained in the later case:

> "Under these circumstances, as in *Widmar,* there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar, supra,* at 271–272, permitting District property to be used to exhibit the film involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Id.,* at 395 (footnote omitted).

In contrast, the installation of the religious symbols in Capitol Square quite obviously did "have the principal or primary effect of advancing or inhibiting religion"; indeed, no other effect is even suggested by the record. The primary difference is that in this case we are dealing with a *visual display*—a symbol readily associated with a religion, in a venue readily associated with the State. This clear image of endorsement was lacking in *Widmar* and *Lamb's Chapel*, in which the issue was access to government facilities. Moreover, there was no question in those cases of an unattended display; private speakers, who could be distinguished from the State, were present. See *supra*, at 801–802. Endorsement might still be present in an access case if, for example, the religious group sought the use of the roof of a public building for an obviously religious ceremony, where many onlookers might witness that ceremony and connect it to the State. But no such facts were alleged in *Widmar* or *Lamb's Chapel*. The religious practices in those cases were simply less obtrusive, and less likely to send a message of endorsement, than the eye-catching symbolism at issue in this case.

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[18] Of course, neither of these endorsements was religious in nature, and thus neither was forbidden by the Constitution.

The battle over the Klan cross underscores the power of such symbolism. The menorah prompted the Klan to seek permission to erect an antisemitic symbol, which in turn not only prompted vandalism but also motivated other sects to seek permission to place their own symbols in the square. These facts illustrate the potential for insidious entanglement that flows from state-endorsed proselytizing. There is no reason to believe that a menorah placed in front of a synagogue would have motivated any reaction from the Klan, or that a Klan cross placed on a Klansman's front lawn would have produced the same reaction as one that enjoyed the apparent imprimatur of the State of Ohio. Nor is there any reason to believe the placement of the displays in Capitol Square had any purpose other than to connect the State—though perhaps against its will—to the religious or antireligious beliefs of those who placed them there. The cause of the conflict is the State's apparent approval of a religious or antireligious message.[19] Our Constitution wisely seeks to minimize such strife by forbidding state-endorsed religious activity.

IV

Conspicuously absent from the plurality's opinion is any mention of the values served by the Establishment Clause. It therefore seems appropriate to repeat a portion of a Court opinion authored by Justice Black who, more than any other Justice in the Court's history, espoused a literal interpretation of constitutional text:

> "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immedi-

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[19] As I stated in *Allegheny:*

"There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building. Even though '[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs,' displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement." 492 U. S., at 650–651 (opinion concurring in part and dissenting in part) (citations omitted), quoting *id.*, at 664 (KENNEDY, J., concurring in judgment in part and dissenting in part).

In the words of Clarence Darrow:

"'The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.'" Tr. of Oral Arg. 7, *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363 (1927), quoted in *Wolman* v. *Walter,* 433 U. S. 229, 264 (1977) (opinion of STEVENS, J.).

ately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

"These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or nonbelievers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a

> minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.
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> . . . . .
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> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 8–10, 15, 16 (1947) (footnotes and citation omitted).

In his eloquent dissent in that same case, Justice Jackson succinctly explained—

> "that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business . . . . It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life . . . ." *Id.,* at 26–27.

The wrestling over the Klan cross in Capitol Square is far removed from the persecution that motivated William Penn to set sail for America, and the issue resolved in *Everson* is quite different from the controversy over symbols that gave rise to this litigation.[20] Nevertheless, the views expressed by both the majority and the dissenters in that landmark case counsel caution before approving the order of a federal judge commanding a State to authorize the placement of freestanding religious symbols in front of the seat of its government. The Court's decision today is unprecedented. It entangles two sovereigns in the propagation of religion, and it disserves the principle of tolerance that underlies the prohibition against state action "respecting an establishment of religion."[21]

I respectfully dissent.

[Appendix to opinion of STEVENS, J., follows this page.]

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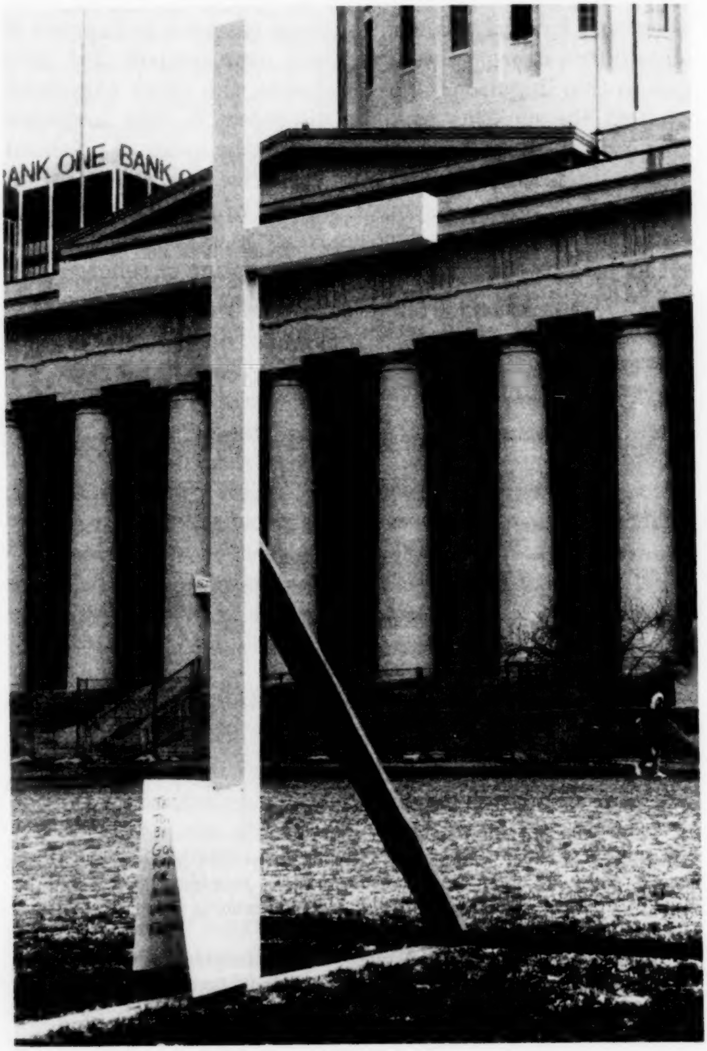
[20] *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), held that a school district could, as part of a larger program of reimbursing students for their transportation to and from school, also reimburse students attending Catholic schools.

[21] The words "respecting an establishment of religion" were selected to emphasize the breadth and richer meaning of this fundamental command. See *Allegheny*, 492 U. S., at 647–649 (STEVENS, J., dissenting).

APPENDIX TO OPINION OF STEVENS, J.



JUSTICE GINSBURG, dissenting.

We confront here, as JUSTICES O'CONNOR and SOUTER point out, a large Latin cross that stood alone and unattended in close proximity to Ohio's Statehouse. See *ante,* at 776 (O'CONNOR, J., concurring in part and concurring in judgment); *ante,* at 792–793 (SOUTER, J., concurring in part and concurring in judgment). Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.

If the aim of the Establishment Clause is genuinely to uncouple government from church, see *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 16 (1947), a State may not permit, and a court may not order, a display of this character. Cf. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 197–214 (1992) (negative bar against establishment of religion implies affirmative establishment of secular public order). JUSTICE SOUTER, in the final paragraphs of his opinion, suggests two arrangements that might have distanced the State from "the principal symbol of Christianity around the world," see *ante,* at 792: a sufficiently large and clear disclaimer, *ante,* at 793–794;[1] or an area reserved for unattended displays carrying no endorsement from the State, a space plainly and permanently so marked, *ante,* at 794. Neither arrangement is even arguably present in this case. The District Court's order did not mandate a disclaimer. See App. to Pet. for Cert. A26 ("Plaintiffs are entitled to an injunction requiring the defendants to issue a permit to erect a cross on Capitol Square"). And the disclaimer the Klan appended to the foot of the cross[2] was unsturdy: It did not identify the Klan as sponsor; it failed to state unequivocally that Ohio did not endorse the display's message; and it was not shown to be legible from a distance. The relief ordered by the District Court thus violated the Establishment Clause.

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[1] Cf. *American Civil Liberties Union* v. *Wilkinson,* 895 F. 2d 1098, 1101, n. 2, 1106 (CA6 1990) (approving disclaimer ordered by District Court, which had to be "'prominently displayed immediately in front of'" the religious symbol and "'readable from an automobile passing on the street directly in front of the structure'"; the approved sign read: "'This display was not constructed with public funds and does not constitute an endorsement by the Commonwealth [of Kentucky] of any religion or religious doctrine.'") (quoting District Court); *McCreary* v. *Stone,* 739 F. 2d 716, 728 (CA2 1984) (disclaimers must meet requirements of size, visibility, and message; disclaimer at issue was too small), aff'd, 471 U. S. 83 (1985) *(per curiam);* Parish, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253, 285–286 (1994) (disclaimer must not only identify the sponsor, it

Whether a court order allowing display of a cross, but demanding a sturdier disclaimer, could withstand Establishment Clause analysis is a question more difficult than the one this case poses. I would reserve that question for another day and case. But I would not let the prospect of what might have been permissible control today's decision on the constitutionality of the display the District Court's order in fact authorized. See *ante,* at 816 (appendix to dissent of STEVENS, J.) (photograph of display).

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must say "in no uncertain language" that the government's permit "in no way connotes [government] endorsement of the display's message"; the "disclaimer's adequacy should be measured by its visibility to the average person viewing the religious display").

[2] The disclaimer stated: "'[T]his cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property.'" See App. to Pet. for Cert. A15–A16.

ROSENBERGER ET AL. *v.* RECTOR AND VISITORS OF UNIVERSITY OF VIRGINIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94–329. Argued March 1, 1995—Decided June 29, 1995

Respondent University of Virginia, a state instrumentality, authorizes payments from its Student Activities Fund (SAF) to outside contractors for the printing costs of a variety of publications issued by student groups called "Contracted Independent Organizations" (CIO's). The SAF receives its money from mandatory student fees and is designed to support a broad range of extracurricular student activities related to the University's educational purpose. CIO's must include in their dealings with third parties and in all written materials a disclaimer stating that they are independent of the University and that the University is not responsible for them. The University withheld authorization for payments to a printer on behalf of petitioners' CIO, Wide Awake Productions (WAP), solely because its student newspaper, Wide Awake: A Christian Perspective at the University of Virginia, "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," as prohibited by the University's SAF Guidelines. Petitioners filed this suit under 42 U. S. C. § 1983, alleging, *inter alia*, that the refusal to authorize payment violated their First Amendment right to freedom of speech. After the District Court granted summary judgment for the University, the Fourth Circuit affirmed, holding that the University's invocation of viewpoint discrimination to deny third-party payment violated the Speech Clause, but concluding that the discrimination was justified by the necessity of complying with the Establishment Clause.

Held:

1. The Guideline invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech. Pp. 828–837.

(a) The Guideline violates the principles governing speech in limited public forums, which apply to the SAF under, *e. g., Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46–47. In determining whether a State is acting within its power to preserve the limits it has set for such a forum so that the exclusion of a class of speech there is legitimate, see, *e. g., id.*, at 49, this Court has observed a distinction between, on the one hand, content discrimination—*i. e.*, discrimination against speech because of its subject matter—which may be permissible if it preserves the limited forum's purposes, and, on the other hand, viewpoint discrimination—*i. e.*, discrimination because of the speaker's specific motivating ideology, opinion, or perspective—which is presumed impermissible when directed against speech otherwise within the forum's limitations, see *id.*, at 46. The most recent and most apposite case in this area is *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 393, in which the Court held that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination. Here, as in that case, the State's actions are properly interpreted as unconstitutional viewpoint discrimination rather than permissible line-drawing based on content: By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Pp. 828–832.

(b) The University's attempt to escape the consequences of *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities is unavailing. Although it may regulate the content of expression when it is the speaker or when it enlists private entities to convey its own message, *Rust* v. *Sullivan*, 500 U. S. 173; *Widmar* v. *Vincent*, 454 U. S. 263, 276, the University may not discriminate based on the viewpoint of private persons whose speech it subsidizes, *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 548. Its argument that the scarcity of public money may justify otherwise impermissible viewpoint discrimination among private speakers is simply wrong. Pp. 832–835.

(c) Vital First Amendment speech principles are at stake here. The Guideline at issue has a vast potential reach: The term "promotes" as used there would comprehend any writing advocating a philosophic position that rests upon a belief (or nonbelief) in a deity or ultimate reality, while the term "manifests" would bring within the prohibition any writing resting upon a premise presupposing the existence (or nonexistence) of a deity or ultimate reality. It is difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Pp. 835–837.

2. The violation following from the University's denial of SAF support to petitioners is not excused by the necessity of complying with the Establishment Clause. Pp. 837–846.

(a) The governmental program at issue is neutral toward religion. Such neutrality is a significant factor in upholding programs in the face of Establishment Clause attack, and the guarantee of neutrality is not offended where, as here, the government follows neutral criteria and evenhanded policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse, *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 704. There is no suggestion that the University created its program to advance religion or aid a religious cause. The SAF's purpose is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," and WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding under the Guidelines as a "student . . . communications . . . grou[p]." Neutrality is also apparent in the fact that the University has taken pains to disassociate itself from the private speech involved in this case. The program's neutrality distinguishes the student fees here from a tax levied for the direct support of a church or group of churches, which would violate the Establishment Clause. Pp. 837–842.

(b) This case is not controlled by the principle that special Establishment Clause dangers exist where the government makes direct money payments to sectarian institutions, see, *e. g., Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 747, since it is undisputed that no public funds flow directly into WAP's coffers under the program at issue. A public university does not violate the Establishment Clause when it grants access to its facilities on a religion-neutral basis to a wide spectrum of student groups, even if some of those groups would use the facilities for devotional exercises. See *e. g., Widmar*, 454 U. S., at 269. This is so even where the upkeep, maintenance, and repair of those facilities are paid out of a student activities fund to which students are required to contribute. *Id.*, at 265. There is no difference in logic or principle, and certainly no difference of constitutional significance, between using such funds to operate a facility to which students have access, and paying a third-party contractor to operate the facility on its behalf. That is all that is involved here: The University provides printing services to a broad spectrum of student newspapers. Were the contrary view to become law, the University could only avoid a constitutional violation by scrutinizing the content of student speech, lest it contain too great a religious message. Such censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis. Pp. 842–846.

18 F. 3d 269, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 846, and THOMAS, J., *post*, p. 852, filed concurring opinions. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 863.

Michael W. McConnell argued the cause for petitioners. With him on the briefs was *Michael P. McDonald.*

John C. Jeffries, Jr., argued the cause for respondents. With him on the brief was *James J. Mingle.**

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Virginia by *James S. Gilmore III*, Attorney General, *David E. Anderson*, Chief Deputy Attorney General, *William Henry Hurd*, Deputy Attorney General, and *Alison Paige Landry*, Assistant Attorney General; for the American Center for Law and Justice by *Jay Alan Sekulow, James Matthew Henderson, Sr.*, and *Keith A. Fournier;* for the Catholic League for Religious and Civil Rights by *Edward M. Gaffney, Jr.;* for the Christian Legal Society et al. by *Douglas Laycock, Steven T. McFarland*, and *Samuel B. Casey;* and for the Intercollegiate Studies Institute by *Robert M. Rader* and *Donn C. Meindertsma.*

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I

The public corporation we refer to as the "University" is denominated by state law as "the Rector and Visitors of the University of Virginia," Va. Code Ann. § 23-69 (1993), and it is responsible for governing the school, see §§ 23-69 to 23-80. Founded by Thomas Jefferson in 1819, and ranked by him, together with the authorship of the Declaration of Independence and of the Virginia Act for Religious Freedom, Va. Code Ann. § 57-1 (1950), as one of his proudest achievements, the University is among the Nation's oldest and most respected seats of higher learning. It has more than 11,000 undergraduate students, and 6,000 graduate and professional students. An understanding of the case requires a somewhat detailed description of the program the University created to support extracurricular student activities on its campus.

Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a "Contracted Independent Organization" (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements. App. to Pet. for Cert. 2a. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO. App. 27-28. CIO's enjoy access to University facilities, including meeting rooms and computer terminals. *Id.*, at 30.

A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO's "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities." *Id.*, at 26.

All CIO's may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities that "are related to the educational purpose of the University." App. to Pet. for Cert. 61a. The SAF is based on the University's "recogni[tion] that the availability of a wide range of opportunities" for its students "tends to enhance the University environment." App. 26. The Guidelines require that it be administered "in a manner consistent with the educational purpose of the University as well as with state and federal law." App. to Pet. for Cert. 61a. The SAF receives its money from a mandatory fee of $14 per semester assessed to each full-time student. The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs. Cf. *id.*, at 63a–64a.

Some, but not all, CIO's may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." *Id.*, at 61a–62a. One of these is "student news, information, opinion, entertainment, or academic communications media groups." *Id.*, at 61a. The Guidelines also specify, however, that the costs of certain activities of CIO's that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses. *Id.*, at 62a–63a. The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which . . . espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." *Id.*, at 65a–66a. A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.*, at 66a.

The Guidelines prescribe these criteria for determining the amounts of third-party disbursements that will be allowed on behalf of each eligible student organization: the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities. If an organization seeks SAF support, it must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups. During the 1990–1991 academic year, 343 student groups qualified as CIO's. One hundred thirty-five of them applied for support from the SAF, and 118 received funding. Fifteen of the groups were funded as "student news, information, opinion, entertainment, or academic communications media groups."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." App. 67. WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." App. 45. The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Ibid.* The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "[r]eligious [o]rganization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." App. to Pet. for Cert. 66a. At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF to pay its printer $5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP's request on the ground that Wide Awake was a "religious activity" within the meaning of the Guidelines, *i. e.*, that the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Ibid.* It made its determination after examining the first issue. App. 54. WAP appealed the denial to the full Student Council, contending that WAP met all the applicable Guidelines and that denial of SAF support on the basis of the magazine's religious perspective violated the Constitution. The appeal was denied without further comment, and WAP appealed to the next level, the Student Activities Committee. In a letter signed by the Dean of Students, the committee sustained the denial of funding. App. 55.

Having no further recourse within the University structure, WAP, Wide Awake, and three of its editors and members filed suit in the United States District Court for the Western District of Virginia, challenging the SAF's action as violative of Rev. Stat. § 1979, 42 U. S. C. § 1983. They alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. They relied also upon Article I of the Virginia Constitution and the Virginia Act for Religious Freedom, Va. Code Ann. §§ 57–1, 57–2 (1986 and Supp. 1994), but did not pursue those theories on appeal. The suit sought damages for the costs of printing the paper, injunctive and declaratory relief, and attorney's fees.

On cross-motions for summary judgment, the District Court ruled for the University, holding that denial of SAF support was not an impermissible content or viewpoint discrimination against petitioners' speech, and that the University's Establishment Clause concern over its "religious activities" was a sufficient justification for denying payment to third-party contractors. The court did not issue a definitive ruling on whether reimbursement, had it been made here, would or would not have violated the Establishment Clause. 795 F. Supp. 175, 181–182 (WD Va. 1992).

The United States Court of Appeals for the Fourth Circuit, in disagreement with the District Court, held that the Guidelines did discriminate on the basis of content. It ruled that, while the State need not underwrite speech, there was a presumptive violation of the Speech Clause when viewpoint discrimination was invoked to deny third-party payment otherwise available to CIO's. 18 F. 3d 269, 279–281 (1994). The Court of Appeals affirmed the judgment of the District Court nonetheless, concluding that the discrimination by the University was justified by the "compelling interest in maintaining strict separation of church and state." *Id.*, at 281. We granted certiorari. 513 U. S. 959 (1994).

II

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641–643 (1994). These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R. A. V.* v. *St. Paul,* 505 U. S. 377, 391 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 46 (1983).

These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384, 390 (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. See, *e. g., Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.,* 473 U. S. 788, 806 (1985); *Perry Ed. Assn., supra,* at 49. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," *Cornelius, supra,* at 804–806; see also *Perry Ed. Assn., supra,* at 46, 49, nor may it discriminate against speech on the basis of its viewpoint, *Lamb's Chapel, supra,* at 392–393; see also *Perry Ed. Assn., supra,* at 46; *R. A. V., supra,* at 386–388, 391–393; cf. *Texas* v. *Johnson,* 491 U. S. 397, 414–415 (1989). Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. See *Perry Ed. Assn., supra,* at 46.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. See, *e. g., Perry Ed. Assn., supra,* at 46–47 (forum analysis of a school mail system); *Cornelius, supra,* at 801 (forum analysis of charitable contribution program). The most recent and most apposite case is our decision in *Lamb's Chapel, supra.* There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective." There was no indication in the record in *Lamb's Chapel* that the request to use the school facilities was "denied, for any reason other than the fact that the presentation would have been from a religious perspective." 508 U. S., at 393–394. Our conclusion was unanimous: "[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.,* at 393.

The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. Brief for Respondents 17, n. 10. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, *e. g., R. A. V., supra,* at 391. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel,* viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid. The church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purposes. Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. See *supra,* at 827. It bears only passing mention that the dissent's attempt to distinguish *Lamb's Chapel* is entirely without support in the law. Relying on the transcript of oral argument, the dissent seems to argue that we found viewpoint discrimination in that case because the government excluded Christian, but not atheistic, viewpoints from being expressed in the forum there. *Post,* at 897–898, and n. 13. The Court relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. There is no indication in the opinion of the Court (which, unlike an advocate's statements at oral argument, is the law) that exclusion or inclusion of other religious or antireligious voices from that forum had any bearing on its decision.

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission. Citing our decisions in *Rust* v. *Sullivan,* 500 U. S. 173 (1991), *Regan* v. *Taxation with Representation of Wash.,* 461 U. S. 540 (1983), and *Widmar* v. *Vincent,* 454 U. S. 263

(1981), the University argues that content-based funding decisions are both inevitable and lawful. Were the reasoning of *Lamb's Chapel* to apply to funding decisions as well as to those involving access to facilities, it is urged, its holding "would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds." Brief for Respondents 16.

To this end the University relies on our assurance in *Widmar* v. *Vincent, supra.* There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U. S., at 276. The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust* v. *Sullivan, supra,* we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U. S., at 194. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id.*, at 196–200.

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. See, *e. g., Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990); *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 270–272 (1988). For that reason, the University's reliance on *Regan* v. *Taxation with Representation of Wash., supra*, is inapposite as well. *Regan* involved a challenge to Congress' choice to grant tax deductions for contributions made to veterans' groups engaged in lobbying, while denying that favorable status to other charities which pursued lobbying efforts. Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, see 461 U. S., at 545–546, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas,'" see *id.*, at 548 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959), in turn quoting *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958)). *Regan* relied on a distinction based on preferential treatment of certain speakers—veterans' organizations—and not a distinction based on the content or messages of those groups' speech. 461 U. S., at 548; cf. *Perry Ed. Assn.*, 460 U. S., at 49. The University's regulation now before us, however, has a speech-based restriction as its sole rationale and operative principle.

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. See *supra*, at 824. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy* v. *James*, 408 U. S. 169, 180–181 (1972); *Keyishian* v. *Board of Regents of*

Univ. of State of N. Y., 385 U. S. 589, 603 (1967); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. See generally R. Palmer & J. Colton, A History of the Modern World 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality," in its ordinary and commonsense meaning, has a vast potential reach. The term "promotes" as used here would comprehend any writing advocating a philosophic position that rests upon a belief in a deity or ultimate reality. See Webster's Third New International Dictionary 1815 (1961) (defining "promote" as "to contribute to the growth, enlargement, or prosperity of: further, encourage"). And the term "manifests" would bring within the scope of the prohibition any writing that is explicable as resting upon a premise that presupposes the existence of a deity or ultimate reality. See *id.*, at 1375 (defining "manifest" as "to show plainly: make palpably evident or certain by showing or displaying"). Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does, see Tr. of Oral Arg. 18–19, those student journalistic efforts that primarily manifest or promote a belief that there is no deity and no ultimate reality, then undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

III

Before its brief on the merits in this Court, the University had argued at all stages of the litigation that inclusion of WAP's contractors in SAF funding authorization would violate the Establishment Clause. Indeed, that is the ground on which the University prevailed in the Court of Appeals. We granted certiorari on this question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious." Pet. for Cert. i. The University now seems to have abandoned this position, contending that "[t]he fundamental objection to petitioners' argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds." Brief for Respondents 29; see *id.*, at 27–29, and n. 17; Tr. of Oral Arg. 14. That the University itself no longer presses the Establishment Clause claim is some indication that it lacks force; but as the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative, it must be addressed.

The Court of Appeals ruled that withholding SAF support from Wide Awake contravened the Speech Clause of the First Amendment, but proceeded to hold that the University's action was justified by the necessity of avoiding a violation of the Establishment Clause, an interest it found compelling. 18 F. 3d, at 281. Recognizing that this Court has regularly "sanctioned awards of direct nonmonetary benefits to religious groups where government has created open fora to which all similarly situated organizations are invited," *id.*, at 286 (citing *Widmar*, 454 U. S., at 277), the Fourth Circuit asserted that direct monetary subsidization of religious organizations and projects is "a beast of an entirely different color," 18 F. 3d, at 286. The court declared that the Establishment Clause would not permit the use of public funds to support "'a specifically religious activity in an otherwise substantially secular setting.'" *Id.*, at 285 (quoting *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973) (emphasis deleted)). It reasoned that because Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," the University's provision of SAF funds for its publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." 18 F. 3d, at 286.

If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation. Before turning to these matters, however, we can set forth certain general principles that must bear upon our determination.

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.*, at 16. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. See *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 704 (1994) (SOUTER, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487–488 (1986); *Mueller* v. *Allen*, 463 U. S. 388, 398–399 (1983); *Widmar, supra*, at 274–275. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See *Lamb's Chapel*, 508 U. S., at 393–394; *Mergens*, 496 U. S., at 248, 252; *Widmar, supra*, at 274–275.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." Pet. for Cert. 66a. The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission. The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 15–16 (1990); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236 (1977). We must treat it, then, as an exaction upon the students.

But the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. See *United States* v. *Butler,* 297 U. S. 1, 61 (1936) ("A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government"); see also *Head Money Cases,* 112 U. S. 580, 595–596 (1884). The SAF cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion. Much like the arrangement in *Widmar,* the money goes to a special fund from which any group of students with CIO status can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church.

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens, supra,* at 250 (opinion of O'CONNOR, J.). In this case, "the government has not fostered or encouraged" any mistaken impression that the student newspapers speak for the University. *Capitol Square Review and Advisory Bd.* v. *Pinette, ante,* at 766. The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State, see *Lee* v. *Weisman*, 505 U. S. 577, 587 (1992); *Witters, supra,* at 489 (citing *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring)); see also *Witters, supra,* at 493 (O'CONNOR, J., concurring in part and concurring in judgment) (citing *Lynch, supra,* at 690 (O'CONNOR, J., concurring)).

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, citing *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 747 (1976); *Bowen* v. *Kendrick*, 487 U. S. 589, 614–615 (1988); *Hunt* v. *McNair*, 413 U. S., at 742; *Tilton* v. *Richardson*, 403 U. S. 672, 679–680 (1971); *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968). The error is not in identifying the principle, but in believing that it controls this case. Even assuming that WAP is no different from a church and that its speech is the same as the religious exercises conducted in *Widmar* (two points much in doubt), the Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. See *Widmar*, 454 U. S., at 269; *Mergens*, 496 U. S., at 252. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses are paid from a student activities fund to which students are required to contribute. *Widmar, supra,* at 265. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar,* involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens,* and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384 (1993); *Widmar, supra; Mergens, supra.* There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIO's by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. As a result, and as in *Widmar*, the University can charge the SAF, and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." *Post*, at 896. That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

> "[T]he dissent fails to establish that the distinction [between 'religious' speech and speech 'about' religion] has intelligible content. There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.' . . .
>
> "[E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E. g., Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970)." 454 U. S., at 269–270, n. 6 (citations omitted).

* * *

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 714 (1994) (O'CONNOR, J., concurring in part and concurring in judgment). This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384 (1993); *Widmar* v. *Vincent,* 454 U. S. 263 (1981). Withholding access would leave an impermissible perception that religious activities are disfavored: "[T]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens,* 496 U. S. 226, 248 (1990) (plurality opinion). "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Kiryas Joel, supra,* at 717 (O'CONNOR, J.). Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

As JUSTICE SOUTER demonstrates, however, *post,* at 868–872 (dissenting opinion), there exists another axiom in the history and precedent of the Establishment Clause. "Public funds may not be used to endorse the religious message." *Bowen* v. *Kendrick*, 487 U. S. 589, 642 (1988) (Blackmun, J., dissenting); see also *id.*, at 622 (O'CONNOR, J., concurring). Our cases have permitted some government funding of secular functions performed by sectarian organizations. See, *e. g., id.*, at 617 (funding for sex education); *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 741 (1976) (cash grant to colleges not to be used for "sectarian purposes"); *Bradfield* v. *Roberts*, 175 U. S. 291, 299–300 (1899) (funding of health care for indigent patients). These decisions, however, provide no precedent for the use of public funds to finance religious activities.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. See *Lee* v. *Weisman*, 505 U. S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing"). As Justice Holmes observed in a different context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types." *Irwin* v. *Gavit*, 268 U. S. 161, 168 (1925) (citation omitted).

In *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.*, at 487. The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church. *Ibid.* We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case: "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). See also *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 10–11 (1993).

The need for careful judgment and fine distinctions presents itself even in extreme cases. *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), provided perhaps the strongest exposition of the no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.*, at 16. Yet the Court approved the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools. *Id.*, at 17–18.

Although some would cynically dismiss the Court's disposition as inconsistent with its protestations, see *id.*, at 19 (Jackson, J., dissenting) ("[T]he most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented' "), the decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict.

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today, see *ante*, at 838–839. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the Contracted Independent Organizations (CIO)—*i. e.*, student groups—provides:

> "The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. . . .
>
> "The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities . . . ." App. 27.

And the agreement requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer:

> "Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." *Id.*, at 28.

Any reader of Wide Awake would be on notice of the publication's independence from the University. Cf. *Widmar* v. *Vincent,* 454 U. S., at 274, n. 14.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), *ante,* at 843, and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication to "promote a better understanding of Islam to the University Community," App. 92. Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens to dominate the forum. Cf. *Capitol Square Review and Advisory Bd.* v. *Pinette, ante,* at 777 (O'CONNOR, J., concurring in part and concurring in judgment); *Mergens,* 496 U. S., at 275.

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, *e. g., Keller* v. *State Bar of Cal.,* 496 U. S. 1, 15 (1990); *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209, 236 (1977). There currently exists a split in the lower courts as to whether such a challenge would be successful. Compare *Hays County Guardian* v. *Supple,* 969 F. 2d 111, 123 (CA5 1992), cert. denied, 506 U. S. 1087 (1993); *Kania* v. *Fordham,* 702 F. 2d 475, 480 (CA4 1983); *Good* v. *Associated Students of Univ. of Wash.,* 86 Wash. 2d 94, 105–106, 542 P. 2d 762, 769 (1975) (en banc), with *Smith* v. *Regents of Univ. of Cal.,* 4 Cal. 4th 843, 863–864, 844 P. 2d 500, 513–514, cert. denied, 510 U. S. 863 (1993). While the Court does not resolve the question here, see *ante,* at 840, the existence of such an opt-out possibility not available to citizens generally, see *Abood, supra,* at 259, n. 13 (Powell, J., concurring in judgment), provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, see *ante,* at 840–841; *post,* at 852–855 (THOMAS, J., concurring); *post,* at 868–872 (SOUTER, J., dissenting), and from government funds generally. Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Kiryas Joel,* 512 U. S., at 720 (opinion concurring in part and concurring in judgment). When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program—such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out—convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

I agree with the Court's opinion and join it in full, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.

Even assuming that the Virginia debate on the so-called "Assessment Controversy" was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion. The dissent's historical discussion glosses over the fundamental characteristic of the Virginia assessment bill that sparked the controversy: The assessment was to be imposed for the support of clergy in the performance of their function of teaching religion. Thus, the "Bill Establishing a Provision for Teachers of the Christian Religion" provided for the collection of a specific tax, the proceeds of which were to be appropriated "by the Vestries, Elders, or Directors of each religious society . . . to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever." See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (appendix to dissent of Rutledge, J.).[1]

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[1] The dissent suggests that the assessment bill would have created a "generally available subsidy program" comparable to respondents' Student Activities Fund (SAF). See *post*, at 869, n. 1. The dissent's characterization of the bill, however, is squarely at odds with the bill's clear purpose and effect to provide "for the support of Christian teachers." *Everson*, 330 U. S., at 72. Moreover, the section of the bill cited by the dissent, see *post*, at 869, n. 1, simply indicated that funds would be "disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise," *Everson, supra*, at 74. This provision disposing of undesignated funds hardly transformed the "Bill Establishing a Provision for Teachers of the Christian Religion" into a truly neutral program that would benefit religious adherents as part of a large class of beneficiaries defined without reference to religion. Indeed, the only appropriation of money made by the bill would have been to promote "the general diffusion of Christian knowledge," 330 U. S., at 72; any possible appropriation for "seminaries of learning" depended entirely on future legislative action.

Even assuming that future legislators would adhere to the bill's directive in appropriating the undesignated tax revenues, nothing in the bill

James Madison's Memorial and Remonstrance Against Religious Assessments (hereinafter Madison's Remonstrance) must be understood in this context. Contrary to the dissent's suggestion, Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. Nor did Madison embrace the argument that forms the linchpin of the dissent: that monetary subsidies are constitutionally different from other neutral benefits programs. Instead, Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards. According to Madison, the Virginia assessment was flawed because it "violate[d] that equality which ought to be the basis of every law." Madison's Remonstrance ¶ 4, reprinted in *Everson, supra,* at 66 (appendix to dissent of Rutledge, J.). The assessment violated the "equality" principle not be-

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would prevent use of those funds solely for sectarian educational institutions. To the contrary, most schools at the time of the founding were affiliated with some religious organization, see C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses 163 (1964), and in fact there was no system of public education in Virginia until several decades after the assessment bill was proposed, see A. Morrison, The Beginnings of Public Education in Virginia, 1776–1860, p. 9 (1917); see also A. Johnson, The Legal Status of Church-State Relationships in the United States 4 (1982) ("In Virginia the parish institutions transported from England were the earliest educational agencies. Although much of the teaching took place in the home and with the aid of tutors, every minister had a school, and it was the duty of the vestry to see that all the poor children were taught to read and write") (footnote omitted). Further, the clearly religious tenor of the Virginia assessment would seem to point toward appropriation of residual funds to sectarian "seminaries of learning." Finally, although modern historians have focused on the opt-out provision, the dissent provides no indication that Madison viewed the Virginia assessment as an evenhanded program; in fact, several of the objections expressed in Madison's Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson, supra,* at 63, focus clearly on the bill's violation of the principle of "equality," or evenhandedness. See *infra* this page and 855–857.

cause it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits. See *ibid.* (arguing that the assessment violated the equality principle "by subjecting some to peculiar burdens" and "by granting to others peculiar exemptions").

Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy. For some, the experience in Virginia is consistent with the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others. See R. Cord, Separation of Church and State: Historical Fact and Current Fiction 20–23 (1982); Smith, Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the *Reynolds* and *Everson* Decisions, 20 Wake Forest L. Rev. 569, 590–591 (1984). Other commentators have rejected this view, concluding that the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion. See, *e. g.,* Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986).

I find much to commend the former view. Madison's focus on the preferential nature of the assessment was not restricted to the fourth paragraph of the Remonstrance discussed above. The funding provided by the Virginia assessment was to be extended only to Christian sects, and the Remonstrance seized on this defect:

> "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." Madison's Remonstrance ¶ 3, reprinted in *Everson, supra,* at 65.

In addition to the third and fourth paragraphs of the Remonstrance, "Madison's seventh, ninth, eleventh, and twelfth arguments all speak, in some way, to the same intolerance, bigotry, unenlightenment, and persecution that had generally resulted from previous exclusive religious establishments." Cord, *supra,* at 21. The conclusion that Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths seems especially clear in light of statements he made in the more relevant context of the House debates on the First Amendment. See *Wallace* v. *Jaffree,* 472 U. S. 38, 98 (1985) (REHNQUIST, J., dissenting) (Madison's views "as reflected by actions on the floor of the House in 1789, [indicate] that he saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects," but not "as requiring neutrality on the part of government between religion and irreligion"). Moreover, even if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from "arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society," Cord, *supra,* at 22, rather than the principle of nonestablishment in the Constitution. In any event, the views of one man do not establish the original understanding of the First Amendment.

But resolution of this debate is not necessary to decide this case. Under any understanding of the Assessment Controversy, the history cited by the dissent cannot support the conclusion that the Establishment Clause "categorically condemn[s] state programs directly aiding religious activity" when that aid is part of a neutral program available to a wide array of beneficiaries. *Post,* at 875. Even if Madison believed that the principle of nonestablishment of religion precluded government financial support for religion *per se* (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies.[2]

In fact, Madison's own early legislative proposals cut against the dissent's suggestion. In 1776, when Virginia's Revolutionary Convention was drafting its Declaration of Rights, Madison prepared an amendment that would have disestablished the Anglican Church. This amendment (which went too far for the Convention and was not adopted) is not nearly as sweeping as the dissent's version of disestablishment; Madison merely wanted the Convention to declare that "no man or class of men ought, on account of religion[,] to be invested with *peculiar* emoluments or privileges . . . ." Madison's Amendments to the Declaration of Rights (May 29–June 12, 1776), in 1 Papers of James Madison 174 (W. Hutchinson & W. Rachal eds. 1962) (emphasis added). Likewise, Madison's Remonstrance stressed that "just government" is "best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." Madison's Remonstrance ¶ 8, reprinted in *Everson*, 330 U. S., at 68; cf. *Terrett* v. *Taylor*, 9 Cranch 43, 49 (1815) (holding that the Virginia Constitution did not prevent the government from "aiding . . . the votaries of every sect to perform their own religious duties," or from "establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead").

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[2] To the contrary, Madison's Remonstrance decried the fact that the assessment bill would require civil society to take "cognizance" of religion. Madison's Remonstrance ¶ 1, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 64 (1947). Respondents' exclusion of religious activities from SAF funding creates this very problem. It requires University officials to classify publications as "religious activities," and to discriminate against the publications that fall into that category. Such a policy also contravenes the principles expressed in Madison's Remonstrance by encouraging religious adherents to cleanse their speech of religious overtones, thus "degrad[ing] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison's Remonstrance ¶ 9, reprinted in *Everson*, *supra*, at 69.

Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government *facilities* but requires discrimination in access to government *funds.* The dissent purports to locate the prohibition against "direct public funding" at the "heart" of the Establishment Clause, see *post,* at 878, but this conclusion fails to confront historical examples of funding that date back to the time of the founding. To take but one famous example, both Houses of the First Congress elected chaplains, see S. Jour., 1st Cong., 1st Sess., 10 (1820 ed.); H. R. Jour., 1st Cong., 1st Sess., 26 (1826 ed.), and that Congress enacted legislation providing for an annual salary of $500 to be paid out of the Treasury, see Act of Sept. 22, 1789, ch. 17, §4, 1 Stat. 70, 71. Madison himself was a member of the committee that recommended the chaplain system in the House. See H. R. Jour., at 11–12; 1 Annals of Cong. 891 (1789); Cord, Separation of Church and State: Historical Fact and Current Fiction, at 25. This same system of "direct public funding" of congressional chaplains has "continued without interruption ever since that early session of Congress." *Marsh* v. *Chambers,* 463 U. S. 783, 788 (1983).[3]

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[3] A number of other, less familiar examples of what amount to direct funding appear in early Acts of Congress. See, *e. g.,* Act of Feb. 20, 1833, ch. 42, 4 Stat. 618–619 (authorizing the State of Ohio to sell "all or any part of the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's . . . purchases . . . and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall be for ever annually applied . . . for the support of religion within the several townships for which said lands were originally reserved and set apart, and for no other use or purpose whatso-

The historical evidence of government support for religious entities through property tax exemptions is also overwhelming. As the dissent concedes, property tax exemptions for religious bodies "have been in place for over 200 years without disruption to the interests represented by the Establishment Clause." *Post*, at 881, n. 7 (citing *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 676–680 (1970)).[4] In my view, the dissent's acceptance of this tradition puts to rest the notion that the Establishment Clause bars monetary aid to religious groups even when the aid is equally available to other groups. A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy.[5] In one instance, the government relieves reli-

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ever"); Act of Mar. 2, 1833, ch. 86, §§ 1, 3, 6 Stat. 538 (granting to Georgetown College—a Jesuit institution—"lots in the city of Washington, to the amount, in value, of twenty-five thousand dollars," and directing the College to sell the lots and invest the proceeds, thereafter using the dividends to establish and endow such professorships as it saw fit); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 103 (1985) (REHNQUIST, J., dissenting) ("As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations").

[4] The Virginia experience during the period of the Assessment Controversy itself is inconsistent with the rigid "no-aid" principle embraced by the dissent. Since at least 1777, the Virginia Legislature authorized tax exemptions for property belonging to the "commonwealth, or to any county, town, college, houses for divine worship, or seminary of learning." Act of Jan. 23, 1800, ch. 2, § 1, 1800 Va. Acts. And even Thomas Jefferson, respondents' founder and a champion of disestablishment in Virginia, advocated the use of public funds in Virginia for a department of theology in conjunction with other professional schools. See S. Padover, The Complete Jefferson 1067 (1943); see also *id.*, at 958 (noting that Jefferson advocated giving "to the sectarian schools of divinity the full benefit [of] the public provisions made for instruction in the other branches of science").

[5] In the tax literature, this identity is called a "tax expenditure," a concept "based upon recognition of the fact that a government can appropriate money to a particular person or group by using a special, narrowly directed tax deduction or exclusion, instead of by using its ordinary direct

gious entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable. The analysis under the Establishment Clause must also be the same: "Few concepts are more deeply embedded in the fabric of our na-

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spending mechanisms. For example, a government with a general income tax, wanting to add $7,000 to the spendable income of a preacher whose top tax rate is 30%, has two ways of subsidizing him. The government can send the preacher a check for $10,000 and tax him on all of his income, or it can authorize him to reduce his taxable income by $23,333.33 [resulting in a tax saving of $7,000]. If the direct payment were itself taxable and did not alter his tax bracket, the preacher would receive the same benefit from the tax deduction as he would from the direct payment." Wolfman, Tax Expenditures: From Idea to Ideology, 99 Harv. L. Rev. 491, 491–492 (1985). In fact, Congress has provided a similar "tax expenditure" in § 107 of the Internal Revenue Code by granting a "'minister of the gospel'" an unlimited exclusion for the rental value of any home furnished as part of his pay or for the rental allowance paid to him. See *id.*, at 492, n. 6.

Although Professor Bittker is certainly a leading scholar in the tax field, the dissent's reliance on Bittker, see *post*, at 881, n. 7, is misplaced in this context. See Adler, The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L. Rev. 855, 862, n. 30 (1993):

"Early criticism of the tax expenditure concept focused on the difficulty of drawing a dividing line between what is or is not a special provision. Professor Boris Bittker, for example, argued that since no tax is all inclusive, exemptions from any tax could not be described as the equivalent of subsidies. Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L. J. 1285 (1969). This wholesale rejection of tax expenditure analysis was short-lived and attracted few supporters. Rather, the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies. The current debate focuses on whether particular items are correctly identified as tax expenditures and whether incentive provisions are more efficient when structured as tax expenditures rather than direct spending programs. *See generally* [numerous authorities]."

tional life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise . . . ." *Walz, supra,* at 676–677.

Consistent application of the dissent's "no-aid" principle would require that " 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 8 (1993) (quoting *Widmar* v. *Vincent,* 454 U. S. 263, 274–275 (1981)). The dissent admits that "evenhandedness may become important to ensuring that religious interests are not inhibited." *Post,* at 879, n. 5. Surely the dissent must concede, however, that the same result should obtain whether the government provides the populace with fire protection by reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program—that is, if a public fire department may extinguish fires at churches—then they may also benefit on equal terms in the former program.

Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Zobrest, supra; Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens,* 496 U. S. 226 (1990); *Texas Monthly, Inc.* v. *Bullock,* 489 U. S. 1 (1989); *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986); *Mueller* v. *Allen,* 463 U. S. 388 (1983); *Widmar, supra.* Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment.

If the Establishment Clause is offended when religious adherents benefit from neutral programs such as the University of Virginia's Student Activities Fund, it must also be offended when they receive the same benefits in the form of in-kind subsidies. The constitutional demands of the Establishment Clause may be judged against either a baseline of "neutrality" or a baseline of "no aid to religion," but the appropriate baseline surely cannot depend on the fortuitous circumstances surrounding the *form* of aid. The contrary rule would lead to absurd results that would jettison centuries of practice respecting the right of religious adherents to participate on neutral terms in a wide variety of government-funded programs.

Our Nation's tradition of allowing religious adherents to participate in evenhanded government programs is hardly limited to the class of "essential public benefits" identified by the dissent. See *post,* at 879, n. 5. A broader tradition can be traced at least as far back as the First Congress, which ratified the Northwest Ordinance of 1787. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. Article III of that famous enactment of the Confederation Congress had provided: "Religion, morality, and knowledge . . . being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.,* at 52, n. (a). Congress subsequently set aside federal lands in the Northwest Territory and other territories for the use of schools. See, *e. g.,* Act of Mar. 3, 1803, ch. 21, § 1, 2 Stat. 225–226; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 279; Act of Feb. 15, 1811, ch. 14, § 10, 2 Stat. 621; Act of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 430; Act of Apr. 20, 1818, ch. 126, § 2, 3 Stat. 467. Many of the schools that enjoyed the benefits of these land grants undoubtedly were church-affiliated sectarian institutions as there was no requirement that the schools be "public." See

C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses 163 (1964). Nevertheless, early Congresses found no problem with the provision of such neutral benefits. See also *id.*, at 174 (noting that "almost universally[,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions").

Numerous other government benefits traditionally have been available to religious adherents on neutral terms. Several examples may be found in the work of early Congresses, including copyright protection for "the author and authors of any map, chart, book or books," Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, and a privilege allowing "every printer of newspapers [to] send one paper to each and every other printer of newspapers within the United States, free of postage," Act of Feb. 20, 1792, ch. 7, § 21, 1 Stat. 238. Neither of these laws made any exclusion for the numerous authors or printers who manifested a belief in or about a deity.

Thus, history provides an answer for the constitutional question posed by this case, but it is not the one given by the dissent. The dissent identifies no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

I

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that such evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion. *Ante*, at 839; see also *ante*, at 846–848 (O'CONNOR, J., concurring). Something more is necessary to justify any religious aid. Some Members of the Court, at least, may think the funding permissible on a view that it is indirect, since the money goes to Wide Awake's printer, not through Wide Awake's own checking account. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums, which sometimes is permissible. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion. Different Members of the Court seek to avoid this bar in different ways. The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax. I do not read JUSTICE O'CONNOR's opinion as sharing that assumption; she places this Student Activities Fund in a category of student funding enterprises from which religious activities in public universities may benefit, so long as there is no consequent endorsement of religion. The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A

The Court's difficulties will be all the more clear after a closer look at Wide Awake than the majority opinion affords. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." App. 45. The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11."

Each issue of Wide Awake contained in the record makes good on the editor's promise and echoes the Apostle's call to accept salvation:

> "The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fail in their duty of love." Mourad & Prince, A Love/Hate Relationship, Nov./Dec. 1990, p. 3.
>
> "When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If, in your lifetime, you did not request a seat

> on His Friendly Skies Flyer by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats (and the Lord will know you not). You will not be able to buy a ticket then; no amount of money or desire will do the trick. You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course)." Ace, The Plane Truth, *ibid.*
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> "'Go into all the world and preach the good news to all creation.' (Mark 16:15) The Great Commission is the prime-directive for our lives as Christians . . . ." Liu, Christianity and the Five-legged Stool, Sept./Oct. 1991, p. 3.
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> "The Spirit provides access to an intimate relationship with the Lord of the Universe, awakens our minds to comprehend spiritual truth and empowers us to serve as effective ambassadors for the Lord Jesus in our earthly lives." Buterbaugh, A Spiritual Advantage, Mar./Apr. 1991, p. 21.

There is no need to quote further from articles of like tenor, but one could examine such other examples as religious poetry, see Macpherson, I Have Started Searching for Angels, Nov./Dec. 1990, p. 18; religious textual analysis and commentary, see Buterbaugh, Colossians 1:1–14: Abundant Life, *id.*, at 20; Buterbaugh, John 14–16: A Spiritual Advantage, Mar./Apr., pp. 20–21; and instruction on religious practice, see Early, Thanksgiving and Prayer, Nov./Dec. 1990, p. 21 (providing readers with suggested prayers and posing contemplative questions about biblical texts); Early, Hope and Spirit, Mar./Apr. 1991, p. 21 (similar).

Even featured essays on facially secular topics become platforms from which to call readers to fulfill the tenets of Christianity in their lives. Although a piece on racism has some general discussion on the subject, it proceeds beyond even the analysis and interpretation of biblical texts to conclude with the counsel to take action because that is the Christian thing to do:

> "God calls us to take the risks of voluntarily stepping out of our comfort zones and to take joy in the whole richness of our inheritance in the body of Christ. We must take the love we receive from God and share it with all peoples of the world.
>
> "Racism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin." Liu, Rosenberger, Mourad, and Prince, "Eracing" Mistakes, Nov./Dec. 1990, p. 14.

The same progression occurs in an article on eating disorders, which begins with descriptions of anorexia and bulimia and ends with this religious message:

> "As thinking people who profess a belief in God, we must grasp firmly the truth, the reality of who we are because of Christ. Christ is the Bread of Life (John 6:35). Through Him, we are full. He alone can provide the ultimate source of spiritual fulfillment which permeates the emotional, psychological, and physical dimensions of our lives." Ferguson & Lassiter, From Calorie to Calvary, Sept./Oct. 1991, p. 14.

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communicatio[n] . . ." (in the language of the University's funding criterion, App. to Pet. for Cert. 61a), but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and . . . to consider what a personal relationship with Jesus Christ means" (in the language of Wide Awake's founder, App. 45). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled, *e. g., Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 770, n. 28 (1973); *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 13 (1947). Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand:

> "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3 (hereinafter Madison's Remonstrance), reprinted in *Everson, supra,* at 65–66 (appendix to dissent of Rutledge, J.).

Madison wrote against a background in which nearly every Colony had exacted a tax for church support, *Everson, supra,* at 10, n. 8, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," 330 U. S., at 11 (footnote omitted). Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Ibid.*[1] Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That

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[1] JUSTICE THOMAS suggests that Madison would have approved of the assessment bill if only it had satisfied the principle of evenhandedness. Nowhere in the Remonstrance, however, did Madison advance the view that Virginia should be able to provide financial support for religion as part of a generally available subsidy program. Indeed, while JUSTICE THOMAS claims that the "funding provided by the Virginia assessment was to be extended only to Christian sects," *ante,* at 855, it is clear that the bill was more general in scope than this. While the bill, which is reprinted in *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 72–74 (1947), provided that each taxpayer could designate a religious society to which he wanted his levy paid, *id.,* at 73, it would also have allowed a taxpayer to refuse to appropriate his levy to any religious society, in which case the legislature was to use these unappropriated sums to fund "seminaries of learning." *Id.,* at 74 (contrary to JUSTICE THOMAS's unsupported assertion, this portion of the bill was no less obligatory than any other). While some of these seminaries undoubtedly would have been religious in character, others would not have been, as a seminary was generally understood at the time to be "any school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments." N. Webster, An American Dictionary of the English Language (1st ed. 1828); see also 14 The Oxford English Dictionary 956 (2d ed. 1989). Not surprisingly, then, scholars have generally agreed that the bill would have provided funding for nonreligious schools. See, *e. g.,* Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897, and n. 108 (1986) ("Any taxpayer could refuse to designate a church, with undesignated church taxes going to a fund for schools. . . . The bill used the phrase 'seminaries of learning,' which almost certainly meant schools generally and not just schools for the training of ministers"); T. Buckley,

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Church and State in Revolutionary Virginia, 1776–1787, p. 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so"); T. Curry, The First Freedoms 141 (1986) ("[T]hose taxes not designated for any specific denomination [were] allocated to education"). It is beside the point that "there was no system of public education in Virginia until several decades after the assessment bill was proposed," *ante*, at 854, n. 1 (THOMAS, J., concurring); because the bill was never passed, the funds that it would have made available for secular, public schools never materialized. The fact that the bill, if passed, would have funded secular as well as religious instruction did nothing to soften Madison's opposition to it.

Nor is it fair to argue that Madison opposed the bill only because it treated religious groups unequally. *Ante*, at 854–855 (THOMAS, J., concurring). In various paragraphs of the Remonstrance, Madison did complain about the bill's peculiar burdens and exemptions, *Everson*, *supra*, at 66, but to identify this factor as the sole point of Madison's opposition to the bill is unfaithful to the Remonstrance's text. Madison strongly inveighed against the proposed aid for religion for a host of reasons (the Remonstrance numbers 15 paragraphs, each containing at least one point in opposition), and crucial here is the fact that many of those reasons would have applied whether or not the state aid was being distributed equally among sects, and whether or not the aid was going to those sects in the context of an evenhanded government program. See, *e. g.*, Madison's Remonstrance, reprinted in *Everson*, 330 U. S., at 64, ¶ 1 ("[I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance"); *id.*, at 67, ¶ 6 (arguing that state support of religion "is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world"); *ibid.*, ¶ 7 ("[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation"). Madison's objections were supplemented by numerous other petitions in opposition to the bill that likewise do not suggest that the lack of evenhandedness was its dispositive flaw. L. Levy, The Establishment Clause: Religion and the First Amendment 63–67 (2d ed. 1994). For example, the petition that received the largest number of signatories was motivated by the view that religion should only be supported voluntarily. *Id.*, at 63–64. Indeed, Madison's Remonstrance did not argue for a bill distributing aid to all sects and religions on an equal basis, and the bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution 84 (P. Kurland & R. Lerner eds. 1987), and its text provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ," *id.*, at 85. See generally *Everson*, 330 U. S., at 13. We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Ibid.;* see also Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 921, 923 (1986) ("[I]f the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion. . . . They did not substitute small taxes for large taxes; three pence was as bad as any larger sum. The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support

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outgrowth of the Remonstrance and the defeat of the Virginia assessment was not such a bill; rather, it was the Virginia Bill for Establishing Religious Freedom, which, as discussed in the text, proscribed the use of tax dollars for religious purposes.

In attempting to recast Madison's opposition as having principally been targeted against "governmental preferences for *particular* religious faiths," *ante*, at 856 (emphasis in original), JUSTICE THOMAS wishes to wage a battle that was lost long ago, for "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another," *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 216 (1963); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 17 (1989) (plurality opinion); *id.*, at 28 (Blackmun, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S. 38, 52–53 (1985); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961); *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962); *Everson, supra*, at 15; see generally *Lee* v. *Weisman*, 505 U. S. 577, 609–616 (1992) (SOUTER, J., concurring).

themselves or they would not, but the government would neither help nor interfere") (footnote omitted); T. Curry, The First Freedoms 217 (1986) (At the time of the framing of the Bill of Rights, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history"); J. Choper, Securing Religious Liberty 16 (1995) ("There is broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many the most serious infringement upon religious liberty—is posed by forcing them to pay taxes in support of a religious establishment or religious activities") (footnotes omitted; internal quotation marks omitted).[2]

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[2] JUSTICE THOMAS attempts to cast doubt on this accepted version of Establishment Clause history by reference to historical facts that are largely inapposite. *Ante,* at 857–858, 862–863 (concurring opinion). As I have said elsewhere, individual Acts of Congress, especially when they are few and far between, scarcely serve as an authoritative guide to the meaning of the Religion Clauses, for "like other politicians, [members of the early Congresses] could raise constitutional ideals one day and turn their backs on them the next. [For example,] . . . [t]en years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship." *Lee* v. *Weisman, supra,* at 626 (concurring opinion). The legislation cited by JUSTICE THOMAS, including the Northwest Ordinance, is no more dispositive than the Alien and Sedition Acts in interpreting the First Amendment. Even less persuasive, then, are citations to constitutionally untested Acts dating from the mid-19th century, for without some rather innovative argument, they cannot be offered as providing an authoritative gloss on the Framers' intent.

JUSTICE THOMAS's references to Madison's actions as a legislator also provide little support for his cause. JUSTICE THOMAS seeks to draw a significant lesson out of the fact that, in seeking to disestablish the Anglican Church in Virginia in 1776, Madison did not inveigh against state funding of religious activities. *Ante,* at 857 (concurring opinion). That was

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee.[3] Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it, see Jefferson's Preamble, *supra*, and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly

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not the task at hand, however. Madison was acting with the specific goal of eliminating the special privileges enjoyed by Virginia Anglicans, and he made no effort to lay out the broader views of church and state that came to bear in his drafting of the First Amendment some 13 years later. That Madison did not speak in more expansive terms than necessary in 1776 was hardly surprising for, as it was, his proposal was defeated by the Virginia Convention as having gone too far. *Ibid.*

Similarly, the invocation of Madison's tenure on the congressional committee that approved funding for legislative chaplains provides no support for more general principles that run counter to settled Establishment Clause jurisprudence. As I have previously pointed out, Madison, upon retirement, "insisted that 'it was not with my approbation, that the deviation from [the immunity of religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury.'" *Lee*, 505 U. S., at 625, n. 6, quoting Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution 105 (P. Kurland & R. Lerner eds. (1987)). And when we turned our attention to deciding whether funding of legislative chaplains posed an establishment problem, we did not address the practice as one instance of a larger class of permissible government funding of religious activities. Instead, *Marsh* v. *Chambers*, 463 U. S. 783, 791 (1983), explicitly relied on the singular, 200-year pedigree of legislative chaplains, noting that "[t]his unique history" justified carving out an exception for the specific practice in question. Given that the decision upholding this practice was expressly limited to its facts, then, it would stand the Establishment Clause on its head to extract from it a broad rule permitting the funding of religious activities.

[3] In the District Court, the parties agreed to the following facts: "The University of Virginia has charged at all times relevant herein and currently charges each full-time student a compulsory student activity fee of $14.00 per semester. There is no procedural or other mechanism by which a student may decline to pay the fee." App. 37; see also *id.*, at 9, 21.

held to be the heart of the prohibition on establishment. *Everson,* 330 U. S., at 15–16 ("The 'establishment of religion' clause . . . means at least this . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"); see *School Dist. of Grand Rapids* v. *Ball,* 473 U. S. 373, 385 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Committee for Public Ed.* v. *Nyquist,* 413 U. S., at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.,* at 772 ("Primary among those evils" against which the Establishment Clause guards "have been sponsorship, financial support, and active involvement of the sovereign in religious activity") (citations and internal quotation marks omitted); see also *Lee* v. *Weisman,* 505 U. S. 577, 640 (1992) (SCALIA, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty") (emphasis deleted); cf. *Flast* v. *Cohen,* 392 U. S. 83, 103–104 (1968) (holding that taxpayers have an adequate stake in the outcome of Establishment Clause litigation to satisfy Article III standing requirements, after stating that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general").

The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide

Awake and, in fact, has categorically condemned state programs directly aiding religious activity, *School Dist.* v. *Ball, supra,* at 395 (striking programs providing secular instruction to nonpublic school students on nonpublic school premises because they are "indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause"); *Wolman* v. *Walter,* 433 U. S. 229, 254 (1977) (striking field trip aid program because it constituted "an impermissible direct aid to sectarian education"); *Meek* v. *Pittenger,* 421 U. S. 349, 365 (1975) (striking material and equipment loan program to nonpublic schools because of the inability to "channe[l] aid to the secular without providing direct aid to the sectarian"); *Committee for Public Ed.* v. *Nyquist, supra,* at 774 (striking aid to nonpublic schools for maintenance and repair of facilities because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes"); *Levitt* v. *Committee for Public Ed. & Religious Liberty,* 413 U. S. 472, 480 (1973) (striking aid to nonpublic schools for state-mandated tests because the State had failed to "assure that the state-supported activity is not being used for religious indoctrination"); *Tilton* v. *Richardson,* 403 U. S. 672, 683 (1971) (plurality opinion) (striking as insufficient a 20-year limit on prohibition for religious use in federal construction program for university facilities because unrestricted use even after 20 years "is in effect a contribution of some value to a religious body"); *id.,* at 689 (Douglas, J., joined by Black, and Marshall, JJ., concurring in part and dissenting in part).

Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter. *Bowen* v. *Kendrick,* 487 U. S. 589, 614–615 (1988) (upholding grant program for services related to premarital adolescent sexual relations on ground that funds cannot be "used by the grantees in such a way as to advance religion"); *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 746–748, 755, 759–761 (1976) (plurality opinion) (upholding general aid program restricting uses of funds to secular activities only); *Hunt* v. *McNair*, 413 U. S. 734, 742–745 (1973) (upholding general revenue bond program excluding from participation facilities used for religious purposes); *Tilton* v. *Richardson*, *supra*, at 679–682 (plurality opinion) (upholding general aid program for construction of academic facilities as "[t]here is no evidence that religion seeps into the use of any of these facilities"); see *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 244–248 (1968) (upholding textbook loan program limited to secular books requested by individual students for secular educational purposes).

Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith." *School Dist.* v. *Ball*, 473 U. S., at 385.

B

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section. Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint," *ante*, at 826, or its "religious perspective," *ante*, at 832, and in distinguishing funding of Wide Awake from the funding of a church, the Court maintains that "[Wide Awake] is not a religious institution, at least in the usual sense," *ante*, at

844;[4] see also *ante,* at 826. The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

Nevertheless, even without the encumbrance of detail from Wide Awake's actual pages, the Court finds something sufficiently religious about the magazine to require examination under the Establishment Clause, and one may therefore ask why the unequivocal prohibition on direct funding does not lead the Court to conclude that funding would be unconstitutional. The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. *Ante,* at 839–842. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant factor" in certain Establishment Clause analysis, not a dispositive one. *Ante,* at 839; see *ante,* at 840–841; see also *ante,* at 846–848 (O'CONNOR, J., concurring); *ante,* at 846 ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause"); *Capitol Square Review and Advisory Bd.* v. *Pinette, ante,* at 777 (O'CONNOR, J., concurring in part and concurring in judgment) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. . . . [N]ot all state policies are permissible under the Religion Clauses simply because they are neutral in form"). This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection. See *ante,* at 842 ("We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity"); *ante,* at 840–841, 844; see also *ante,* at 847 (O'CONNOR, J., concurring) ("[Our] decisions . . . provide no precedent for the use of public funds to finance religious activities").

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[4] To the extent the Court perceives some distinction between the printing and dissemination of evangelism and proselytization, and core religious activity "in [its] usual sense," *ante,* at 844, this distinction goes entirely unexplained in the Court's opinion.

In order to understand how the Court thus begins with sound rules but ends with an unsound result, it is necessary to explore those rules in greater detail than the Court does. As the foregoing quotations from the Court's opinion indicate, the relationship between the prohibition on direct aid and the requirement of evenhandedness when affirmative government aid does result in some benefit to religion reflects the relationship between basic rule and marginal criterion. At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Is any government activity that provides any incidental benefit to religion likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important. However the Court may in the past have phrased its line-drawing test, the question whether such benefits are provided on an evenhanded basis has been relevant, for the question addresses one aspect of the issue whether a law is truly neutral with respect to religion (that is, whether the law either "advance[s] [or] inhibit[s] religion," *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 592 (1989)). In *Widmar* v. *Vincent,* 454 U. S. 263, 274 (1981), for example, we noted that "[t]he provision of benefits to [a] broad . . . spectrum of [religious and nonreligious] groups is an important index of secular effect." See also *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 702–705 (1994). In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channelling aid to it exclusively. Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law,[5] but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.

Three cases permitting indirect aid to religion, *Mueller* v. *Allen,* 463 U. S. 388 (1983), *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), and *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993), are among the latest of those to illustrate this relevance of evenhandedness when advancement is not so obvious as to be patently unconstitutional. Each case involved a program in which benefits given to individuals on a religion-neutral basis ultimately were used by the individuals, in one way or another, to support religious institutions.[6] In each, the fact that aid was distributed generally and on a neutral basis was a necessary condition for upholding the program at issue. *Witters, supra,* at 487–488; *Mueller, supra,* at 397–399; *Zobrest, supra,* at 10–11. But the significance of evenhandedness stopped there. We did not, in any of these cases, hold that satisfying the condition was sufficient, or dispositive. Even more importantly, we never held that evenhandedness might be sufficient to render direct aid to religion constitutional. Quite the contrary. Critical to our decisions in these cases was the fact that the aid was indirect; it reached religious institutions "only as a result of the genuinely independent and private choices of aid recipients," *Witters, supra,* at 487; see also *Mueller, supra,* at 399–400; *Zobrest, supra,* at 10–13. In noting and relying on this particular feature of each of the programs at issue, we in fact reaffirmed the core prohibition on direct funding of religious activities. See *Zobrest, supra,* at 12–13; *Witters, supra,* at 487; see also *Mueller, supra,* at 399–400. Thus, our holdings in these cases were little more than extensions of the unremarkable proposition that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier . . . ." *Witters, supra,* at 486–487. Such "attenuated financial benefit[s], ultimately controlled by the private choices of individual[s]," we have found, are simply not within the contemplation of the Establishment Clause's broad prohibition. *Mueller, supra,* at 400; see also *Witters, supra,* at 493 (opinion of O'CONNOR, J.).[7]

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[5] In a narrow band of cases at the polar extreme from direct funding cases, those involving essential public benefits commonly associated with living in an organized society (like police and fire protection, for example), evenhandedness may become important to ensuring that religious interests are not inhibited.

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[6] In *Zobrest,* a deaf student sought to have an interpreter, provided under a state Act aiding individuals with disabilities, accompany him to a Roman Catholic high school. In *Witters,* a blind student sought to use aid, provided under a state program for assistance to handicapped persons, to attend a private Christian college. In *Mueller,* parents sought to take a tax deduction, available for parents of both public and nonpublic schoolchildren, for certain expenses incurred in connection with providing education for their children in private religious schools.

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[7] *Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664 (1970), is yet another example of a case in which the Court treated the general availability of a government benefit as a significant condition defining compliance with the Establishment Clause, but did not deem that condition sufficient. In upholding state property tax exemptions given to religious organizations in *Walz,* we noted that the law at issue was applicable to "a broad class of property owned by nonprofit [and] quasi-public corporations," *id.,* at 673, but did not rest on that factor alone. Critical to our decision was the central principle that direct funding of religious activities is prohibited under the Establishment Clause. "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.,* at 668. We emphasized that the tax exemptions did not involve the expenditure of government funds in support of religious activities. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.,* at 675. Moreover, we noted that in the property taxation context, "exemption[s] creat[e] only a minimal and remote involvement between church and state and far less than taxation of churches," and in operation "ten[d] to complement and reinforce the desired separation insulating" church and state, *id.,* at 676; and that religious property tax exemptions have been in place for over 200 years without disruption to the interests represented by the Establishment Clause, *id.,* at 676–680.

JUSTICE THOMAS's assertion, that "[a] tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy," *ante,* at 859 (concurring opinion) (footnote omitted), assumes that the "natural" or "correct" tax base is so self-evident that any provision excusing a person or institution from taxes to which others are subjected must be a departure from the natural tax base rather than part of the definition of the tax base itself. The equivalence (asserted by JUSTICE THOMAS, *ibid.*) between a direct money subsidy and the tax liability avoided by an institution (because it is part of the class of institutions that defines the relevant tax base by its exclusion) was tested and dispatched long ago by Professor Bittker in Churches, Taxes and the Constitution, 78 Yale L. J. 1285 (1969). JUSTICE THOMAS's suggestion that my "reliance

Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid. See, *e. g., Tilton* v. *Richardson,* 403 U. S., at 682–684 (striking portion of general aid program providing grants for construction of college and university facilities to the extent program made possible the use of funds for sectarian activities);[8] *Wolman* v. *Walter,* 433 U. S., at 252–255 (striking funding of field trips for nonpublic school students, such as are "provided to public school students in the district," because of unacceptable danger that state funds would be used to foster religion). And nowhere has the Court's adherence to the preeminence of the no-direct-funding principle over the principle of evenhandedness been as clear as in *Bowen* v. *Kendrick,* 487 U. S. 589 (1988).

Bowen involved consideration of the Adolescent Family Life Act (AFLA), a federal grant program providing funds to institutions for counseling and educational services related to adolescent sexuality and pregnancy. At the time of the litigation, 141 grants had been awarded under the AFLA to

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on Bittker . . . is misplaced in this context," *ante,* at 860, n. 5, is not on point. Even granting that JUSTICE THOMAS's assertion of equivalence is reasonable, he cannot and does not deny the fact that the Court in *Walz* explicitly distinguished tax exemptions from direct money subsidies, 397 U. S., at 675, and rested its decision on that distinction. If JUSTICE THOMAS's assertion of equivalence should prevail then the *Walz* Court necessarily was wrong about a distinction critical to its holding. JUSTICE THOMAS can hardly use *Walz* coherently for support after removing the basis on which it relies.

[8] Although the main opinion in *Tilton* was a plurality, the entire Court was unanimous on this point. See 403 U. S., at 682–684 (plurality opinion); *id.,* at 692 (Douglas, J., joined by Black and Marshall, JJ., concurring in part and dissenting in part); *Lemon* v. *Kurtzman,* 403 U. S. 602, 659–661 (1971) (opinion of Brennan, J.); *id.,* at 665, n. 1 (opinion of White, J.).

a broad array of both secular and religiously affiliated institutions. *Id.*, at 597. In an Establishment Clause challenge to the Act brought by taxpayers and other interested parties, the District Court resolved the case on a pretrial motion for summary judgment, holding the AFLA program unconstitutional both on its face and also insofar as religious institutions were involved in receiving grants under the Act. When this Court reversed on the issue of facial constitutionality under the Establishment Clause, *id.*, at 602–618, we said that there was "no intimation in the statute that at some point, or for some grantees, religious uses are permitted." *Id.*, at 614. On the contrary, after looking at the legislative history and applicable regulations, we found safeguards adequate to ensure that grants would not be "used by . . . grantees in such a way as to advance religion." *Id.*, at 615.

With respect to the claim that the program was unconstitutional as applied, we remanded the case to the District Court "for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered." *Id.*, at 621. Specifically, we told the District Court, on remand, to "consider . . . whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'" *Ibid.*, quoting *Hunt* v. *McNair*, 413 U. S., at 743. In giving additional guidance to the District Court, we suggested that application of the Act would be unconstitutional if it turned out that aid recipients were using materials "that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." *Bowen*, 487 U. S., at 621. At no point in our opinion did we suggest that the breadth of potential recipients, or distribution on an evenhanded basis, could have justified the use of federal funds for religious activities, a position that would have made no sense after we had pegged the Act's facial constitutionality to our conclusion that advancement of religion was not inevitable. JUSTICE O'CONNOR's separate opinion in the case underscored just this point: "I fully agree . . . that '[p]ublic funds may not be used to endorse the religious message.' [487 U. S.,] at 642 [(Blackmun, J., dissenting)]. . . . *[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.*, at 622–623 (concurring opinion) (emphasis in original).

Bowen was no sport; its pedigree was the line of *Everson* v. *Board of Ed.*, 330 U. S., at 16–18, *Board of Ed.* v. *Allen*, 392 U. S., at 243–249, *Tilton* v. *Richardson*, *supra*, at 678–682, *Hunt* v. *McNair*, *supra*, at 742–745, and *Roemer* v. *Board of Public Works of Md.*, 426 U. S., at 759–761. Each of these cases involved a general aid program that provided benefits to a broad array of secular and sectarian institutions on an evenhanded basis, but in none of them was that fact dispositive. The plurality opinion in *Roemer* made this point exactly:

> "The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike." 426 U. S., at 747 (opinion of Blackmun, J.).

Instead, the central enquiry in each of these general aid cases, as in *Bowen*, was whether secular activities could be separated from the sectarian ones sufficiently to ensure that aid would flow to the secular alone.

Witters, *Mueller*, and *Zobrest* expressly preserve the standard thus exhibited so often. Each of these cases explicitly distinguished the indirect aid in issue from contrasting examples in the line of cases striking down direct aid, and each thereby expressly preserved the core constitutional principle that direct aid to religion is impermissible. See *Zobrest*, 509 U. S., at 11–13 (distinguishing *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *School Dist.* v. *Ball*, 473 U. S. 373 (1985), and noting that "'[t]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is “that of a direct subsidy to the religious school”’ ”) (quoting *Witters*, 474 U. S., at 487); see also *ibid.; Mueller*, 463 U. S., at 399. It appears that the University perfectly understood the primacy of the no-direct-funding rule over the evenhandedness principle when it drew the line short of funding “an[y] activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality.”[9] App. to Pet. for Cert. 66a.

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[9] Congress apparently also reads our cases as the University did, for it routinely excludes religious activities from general funding programs. See, *e. g.*, 20 U. S. C. § 1062(b) (federal grant program for institutions of higher education; “[n]o grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity”); 20 U. S. C. § 1069c (certain grants to higher education institutions “may not be used . . . for a school or department of divinity or any religious worship or sectarian activity . . .”); 20 U. S. C. § 1132c–3(c) (1988 ed., Supp. V) (federal assistance for renovation of certain academic facilities; “[n]o loan may be made under this part for any educational program, activity or service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission”); 20 U. S. C. § 1132i(c) (grant program for educational facilities; “no project assisted with funds under this subchapter shall ever be used for religious worship or a sectarian activity or for a school or department of divinity”); 20 U. S. C. § 1213d (“No grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity”); 25 U. S. C. § 3306(a) (1988 ed., Supp. V) (funding for Indian higher education programs; “[n]one of the funds made available under this subchapter may be used for study at any school or department of divinity or for any religious worship or sectarian activity”); 29 U. S. C. § 776(g) (grants for projects and activities for rehabilitation of handicapped persons; “[n]o funds provided under this subchapter may be used to assist in the construction of any facility which is or will be used for religious worship or any sectarian activity”); 42 U. S. C. § 3027(a)(14)(A)(iv) (1988 ed. and Supp. V) (requiring States seeking federal aid for construction of centers for the elderly to submit plans providing assurances that “the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as . . . place[s] for religious worship”); 42 U. S. C. § 5001(a)(2) (1988 ed.,

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Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate its permissibility. For one reason or another, the Court's chosen element appears to be the fact that under the University's Guidelines, funds are sent to the printer chosen by Wide Awake, rather than to Wide Awake itself. *Ante,* at 842–844.

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If the Court's suggestion is that this feature of the funding program brings this case into line with *Witters, Mueller,* and *Zobrest* (discussed *supra,* at 879–881), the Court has misread those cases, which turned on the fact that the choice to benefit religion was made by a nonreligious third party standing between the government and a religious institution. See *Witters, supra,* at 487; see also *Mueller, supra,* at 399–400; *Zobrest, supra,* at 8–13. Here there is no third-party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use. The printer, of course, has no option to take the money and use it to print a secular journal instead of Wide Awake. It only gets the money because of its contract to print a message of religious evangelism at the direction of Wide Awake, and it will receive payment only for doing precisely that. The formalism of distinguishing between payment to Wide Awake so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of constitutional law. If

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Supp. V) (federal grants to support volunteer projects for the elderly, but not including "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship"); 42 U. S. C. § 9858k(a) (1988 ed., Supp. V) (no child care and development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction").

this indeed were a critical distinction, the Constitution would permit a State to pay all the bills of any religious institution;[10] in fact, despite the Court's purported adherence to the no-direct-funding principle, the State could simply hand out credit cards to religious institutions and honor the monthly statements (so long as someone could devise an evenhanded umbrella to cover the whole scheme). *Witters* and the other cases cannot be distinguished out of existence this way.

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It is more probable, however, that the Court's reference to the printer goes to a different attempt to justify the payment. On this purported justification, the payment to the printer is significant only as the last step in an argument resting on the assumption that a public university may give a religious group the use of any of its equipment or facilities so long as secular groups are likewise eligible. The Court starts with the cases of *Widmar* v. *Vincent*, 454 U. S. 263 (1981), *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990), and *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), in which religious groups were held to be entitled to access for speaking in government buildings open generally for that purpose. The Court reasons that the availability of a forum has economic value (the government built and maintained the building, while the speakers saved the rent for a hall); and that economically there is no difference between the University's provision of the value of the room and the value, say, of the University's printing equipment; and that therefore the University must be able to provide the use of the latter. Since it may do that, the argument goes, it would be unduly formalistic to draw the line at paying for an outside printer, who simply does what the magazine's publishers could have done with the University's own printing equipment. *Ante*, at 843–844.

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[10] The Court acknowledges that "if the State pays a church's bills it is subsidizing it," and concedes that "we must guard against this abuse." *Ante*, at 844. These concerns are not present here, the Court contends, because Wide Awake "is not a religious institution, at least in the usual sense of that term as used in our case law." *Ibid.* The Court's concession suggests that its distinction between paying a religious institution and paying a religious institution's bills is not really significant. But if the Court is relying on its characterization of Wide Awake as not a religious institution, "at least in the usual sense," the Court could presumably stop right there.

The argument is as unsound as it is simple, and the first of its troubles emerges from an examination of the cases relied upon to support it. The common factual thread running through *Widmar*, *Mergens*, and *Lamb's Chapel* is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. See generally *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983) (forum analysis). In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in *Widmar* and *Mergens*) or to suppress a particular religious viewpoint (as in *Lamb's Chapel*, see *infra*, at 897–898). In each case, to be sure, the religious speaker's use of the room passed muster as an incident of a plan to facilitate speech generally for a secular purpose, entailing neither secular entanglement with religion nor risk that the religious speech would be taken to be the speech of the government or that the government's endorsement of a religious message would be inferred. But each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum. It was the preservation of free speech on the model of the street corner that supplied the justification going beyond the requirement of evenhandedness.

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. The argument from economic equivalence thus breaks down on recognizing that the direct state aid it would support is not mitigated by the street corner analogy in the service of free speech. Absent that, the rule against direct aid stands as a bar to printing services as well as printers.

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It must, indeed, be a recognition of just this point that leads the Court to take a third tack, not in coming up with yet a third attempt at justification within the rules of existing case law, but in recasting the scope of the Establishment Clause in ways that make further affirmative justification unnecessary. JUSTICE O'CONNOR makes a comprehensive analysis of the manner in which the activity fee is assessed and distributed. She concludes that the funding differs so sharply from religious funding out of governmental treasuries generally that it falls outside Establishment Clause's purview in the absence of a message of religious endorsement (which she finds not to be present). *Ante*, at 849–852 (concurring opinion). The opinion of the Court concludes more expansively that the activity fee is not a tax, and then proceeds to find the aid permissible on the legal assumption that the bar against direct aid applies only to aid derived from tax revenue. I have already indicated why it is fanciful to treat the fee as anything but a tax, *supra*, at 873–874, and n. 3; see also *ante*, at 840 (noting mandatory nature of the fee), and will not repeat the point again. The novelty of the assumption that the direct aid bar only extends to aid derived from taxation, however, requires some response.

Although it was a taxation scheme that moved Madison to write in the first instance, the Court has never held that government resources obtained without taxation could be used for direct religious support, and our cases on direct government aid have frequently spoken in terms in no way limited to tax revenues. *E. g., School Dist.* v. *Ball*, 473 U. S., at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Nyquist*, 413 U. S., at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.*, at 772 ("Primary among those evils" against which the Establishment Clause guards "have been sponsorship, financial support, and active involvement of the sovereign in religious activity") (citations and internal quotation marks omitted); see also T. Curry, The First Freedoms 217 (1986) (At the time of the framing of the Bill of Rights, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history").

Allowing nontax funds to be spent on religion would, in fact, fly in the face of clear principle. Leaving entirely aside the question whether public nontax revenues could ever be used to finance religion without violating the endorsement test, see *County of Allegheny* v. *American Civil Liberties Union*, 492 U. S., at 593–594, any such use of them would ignore one of the dual objectives of the Establishment Clause, which was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government. *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962) (the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *Everson*, 330 U. S., at 53 (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting") (citing Madison's Remonstrance ¶¶ 7, 8, reprinted in *Everson, supra*, at 63–72 (appendix to dissent of Rutledge, J.)); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 259 (1963) (Brennan, J., concurring) ("It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government") (footnote omitted); Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution, at 84–85. Since the corrupting effect of government support does not turn on whether the Government's own money comes from taxation or gift or the sale of public lands, the Establishment Clause could hardly relax its vigilance simply because tax revenue was not implicated. Accordingly, in the absence of a forthright disavowal, one can only assume that the Court does not mean to eliminate one half of the Establishment Clause's justification.

D

Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.

II

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. *Widmar*, 454 U. S., at 271 (university's compliance with its Establishment Clause obligations can be a compelling interest justifying speech restriction). But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

The Court acknowledges, *ante*, at 832, the necessity for a university to make judgments based on the content of what may be said or taught when it decides, in the absence of unlimited amounts of money or other resources, how to honor its educational responsibilities. *Widmar, supra*, at 276; cf. *Perry*, 460 U. S., at 49 (subject matter and speaker identity distinctions "are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property"). Nor does the Court generally question that in allocating public funds a state university enjoys spacious discretion. Cf. *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991) ("[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program"); *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540 (1983) (upholding government subsidization decision partial to one class of speaker).[11] Accordingly, the Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints, *ante*, at 829–830, citing, *inter alia*, *Perry*, *supra*, at 46; see also *Lamb's Chapel*, 508 U. S., at 392–393 (subject-matter distinctions permissible in controlling access to limited public forum if reasonable and viewpoint neutral); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985) (similar); *Regan*, *supra*, at 548.[12]

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[11] The Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech, suggesting that authority to make content-related choices is at its most powerful when the State undertakes the former. *Ante*, at 833–835. I would not argue otherwise, see *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 270–273 (1988), but I do suggest that this case reveals the difficulties that can be encountered in drawing this distinction. There is a communi-

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. See *Cornelius*, *supra*, at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely

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cative element inherent in the very act of funding itself, cf. *Buckley* v. *Valeo*, 424 U. S. 1, 15–19 (1976) *(per curiam)*, and although it is the student speakers who choose which particular messages to advance in the forum created by the University, the initial act of defining the boundaries of the forum is a decision attributable to the University, not the students. In any event, even assuming that private and state speech always may be separated by clean lines and that this case involves only the former, I believe the distinction is irrelevant here because, as is discussed *infra*, this case does not involve viewpoint discrimination.

[12] I do not decide that all viewpoint discrimination in a public university's funding determinations would violate the Free Speech Clause. If, however, the determinations are made on the basis of a reasonable subject-matter distinction, but not on a viewpoint distinction, there is no violation. In a limited-access forum, a speech restriction must be "'reasonable in light of the purpose served by the forum'" as well as viewpoint neutral. *E. g., Lamb's Chapel*, 508 U. S., at 392–393, quoting *Cornelius*, 473 U. S., at 806. Because petitioners have not challenged the University's Guideline as unreasonable, I express no opinion on that or on the question whether the reasonableness criterion applies in speech funding cases in the same manner that it applies in limited-access forum cases.

to suppress the point of view he espouses on an otherwise includible subject"). As when deciding whether a speech restriction is content based or content neutral, "[t]he government's purpose is the controlling consideration." *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989); see also *ibid.* (content neutrality turns on, *inter alia,* whether a speech restriction is "justified without reference to the content of the regulated speech") (internal quotation marks and citations omitted) (emphasis deleted). So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. Accord, *Rock Against Racism, supra.* Nor does a municipality's decision to prohibit political advertising on bus placards amount to viewpoint discrimination when in the course of applying this policy it denies space to a person who wishes to speak in favor of a particular political candidate. Accord, *Lehman* v. *Shaker Heights,* 418 U. S. 298, 304 (1974) (plurality opinion).

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. See *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 785–786 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted); *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167, 175–176 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees") (footnote omitted);

United States v. *Kokinda*, 497 U. S. 720, 736 (1990) (viewpoint discrimination involves an "inten[t] to discourage one viewpoint and advance another") (plurality opinion) (citations and internal quotation marks omitted). It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is not eligible for funding, App. to Pet. for Cert. 62a, is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality," *id.*, at 66a. It is clear that this is the basis on which Wide Awake Productions was denied funding. Letter from Student Council to Ronald W. Rosenberger, App. 54 ("In reviewing the request by Wide Awake Productions, the Appropriations Committee determined your organization's request could not be funded as it is a religious activity"). The discussion of Wide Awake's content, *supra*, at 865–868, shows beyond any question that it "primarily promotes or manifests a particular belief(s) in or about a deity . . . ," in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists (as the University maintained at oral argument, Tr. of Oral Arg. 18–19, and as the Court recognizes, see *ante,* at 836–837). The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that "primarily promotes or manifests" any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Court, of course, reads the Guidelines differently, but while I believe the Court is wrong in construing their breadth, the important point is that even on the Court's own construction the Guidelines impose no viewpoint discrimination. In attempting to demonstrate the potentially chilling effect such funding restrictions might have on learning in our Nation's universities, the Court describes the Guidelines as "a sweeping restriction on student thought and student inquiry," disentitling a vast array of topics to funding. *Ante,* at 836. As the Court reads the Guidelines to exclude "any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality," *ibid.,* as well as "those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality," the Court concludes that the major works of writers from Descartes to Sartre would be barred from the funding forum, *ante,* at 837. The Court goes so far as to suggest that the Guidelines, properly interpreted, tolerate nothing much more than essays on "making pasta or peanut butter cookies." *Ibid.*

Now, the regulation is not so categorically broad as the Court protests. The Court reads the word "primarily" ("primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality") right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion. But, as I said, that is not the important point. Even if the Court were indeed correct about the funding restriction's categorical breadth, the stringency of the restriction would most certainly not work any impermissible viewpoint discrimination under any prior understanding of that species of content discrimination. If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone's viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

The Guidelines are thus substantially different from the access restriction considered in *Lamb's Chapel*, the case upon which the Court heavily relies in finding a viewpoint distinction here, *ante*, at 830–832. *Lamb's Chapel* addressed a school board's regulation prohibiting the after-hours use of school premises "by any group for religious purposes," even though the forum otherwise was open for a variety of social, civic, and recreational purposes. 508 U. S., at 387 (citation and internal quotation marks omitted). "Religious" was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a nonreligious or expressly antireligious point of view on any subject, see *ibid.* ("The issue in this case is whether . . . it violates the Free Speech Clause of the First Amendment . . . to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues"); *id.*, at 394, citing *May* v. *Evansville-Vanderburgh School Corp.*, 787 F. 2d 1105, 1114 (CA7 1986).[13]

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[13] See also Tr. of Oral Arg. in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, O. T. 1992, No. 91–2024, where counsel for the school district charged with enforcing the restriction unequivocally admitted that anyone with an atheistic or antireligious message would be permitted to

With this understanding, it was unremarkable that in *Lamb's Chapel* we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. See *Lamb's Chapel, supra,* at 393–394 (considering as-applied challenge only). Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreli-

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use school property under the rules of the forum. *Id.,* at 47, 57–58. The complete exchange during the oral argument in *Lamb's Chapel* went as follows:

"QUESTION: But do I understand your statement you made earlier that supposing you had a communist group that wanted to address the subject of family values and they thought there was a value in not having children waste their time going to Sunday school or church and therefore they had a point of view that was definitely antireligious, they would be permitted, under your policy, to discuss family values in that context?

"[COUNSEL]: Yes. Yes, Your Honor, that's correct.

. . . . .

"QUESTION: Counsel, in your earlier discussions with [the Court] you indicated that communists would be able to give their perspective on family. I—I assume from that that atheists would be able to give theirs under your rules.

"[COUNSEL]: Yes, Your Honor."

gious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums. See *Greer* v. *Spock*, 424 U. S. 828 (1976) (upholding regulation prohibiting political speeches on military base); *Cornelius*, 473 U. S., at 812 (exclusion from fundraising drive of political activity or advocacy groups is facially viewpoint neutral despite inclusion of charitable, health, and welfare agencies); *Perry*, 460 U. S., at 49–50, and n. 9 (ability of teachers' bargaining representative to use internal school mail system does not require that access be provided to "any other citizen's group or community organization with a message for school personnel"); *Lehman*, 418 U. S., at 304 (plurality opinion) (exclusion of political messages from forum permissible despite ability of nonpolitical speakers to use the forum).

III

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon* v. *Kurtzman*, 403 U. S. 602, 624 (1971): "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

I respectfully dissent.

MILLER ET AL. *v.* JOHNSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

No. 94–631. Argued April 19, 1995—Decided June 29, 1995*

In *Shaw* v. *Reno*, 509 U. S. 630, this Court articulated the equal protection principles that govern a State's drawing of congressional districts, noting that laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decisionmaking, that this prohibition extends to laws neutral on their face but unexplainable on grounds other than race, and that redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny given to other state laws that classify citizens by race. Georgia's most recent congressional districting plan contains three majority-black districts and was adopted after the Justice Department refused to preclear, under § 5 of the Voting Rights Act (Act), two earlier plans that each contained only two majority-black districts. Appellees, voters in the new Eleventh District—which joins metropolitan black neighborhoods together with the poor black populace of coastal areas 260 miles away—challenged the district on the ground that it was a racial gerrymander in violation of the Equal Protection Clause as interpreted in *Shaw*. The District Court agreed, holding that evidence of the state legislature's purpose, as well as the district's irregular borders, showed that race was the overriding and predominant force in the districting determination. The court assumed that compliance with the Act would be a compelling interest, but found that the plan was not narrowly tailored to meet that interest since the Act did not require three majority-black districts.

Held: Georgia's congressional redistricting plan violates the Equal Protection Clause. Pp. 910–928.

(a) Parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding a district's geometry and makeup nor required to make a threshold showing of bizarreness. A district's shape is relevant to *Shaw*'s equal protection analysis not because bizarreness is a necessary element of the constitu-

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*Together with No. 94–797, *Abrams et al.* v. *Johnson et al.*, and No. 94–929, *United States* v. *Johnson et al.*, also on appeal from the same court.

tional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was a legislature's dominant and controlling rationale in drawing district lines. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters based on race, but where the district is not so bizarre, parties may rely on other evidence to establish race-based districting. The very stereotypical assumptions the Equal Protection Clause forbids underlie the argument that the Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting involves racial consideration. While redistricting usually implicates a political calculus in which various interests compete for recognition, it does not follow that individuals of the same race share a single political interest. Nor can the analysis used to assess the vote dilution claim in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S. 144, be applied to resuscitate this argument. Pp. 910–915.

(b) Courts must exercise extraordinary caution in adjudicating claims that a State has drawn race-based district lines. The plaintiff must show, whether through circumstantial evidence of a district's shape and demographics or more direct evidence of legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Pp. 915–917.

(c) The District Court applied the correct analysis here, and its finding that race was the predominant factor motivating the Eleventh District's drawing was not clearly erroneous. It need not be decided whether the district's shape, standing alone, was sufficient to establish that the district is unexplainable on grounds other than race, for there is considerable additional evidence showing that the state legislature was motivated by a predominant, overriding desire to create a third majority-black district in order to comply with the Justice Department's preclearance demands. The District Court's well-supported finding justified its rejection of the various alternative explanations offered for the district. Appellants cannot refute the claim of racial gerrymandering by arguing the legislature complied with traditional districting principles, since those factors were subordinated to racial objectives. Nor are there tangible communities of interest spanning the district's hundreds of miles that can be called upon to rescue the plan. Since race was the predominant, overriding factor behind the Eleventh District's drawing, the State's plan is subject to strict scrutiny and can be sustained only if it is narrowly tailored to achieve a compelling state interest. Pp. 917–920.

(d) While there is a significant state interest in eradicating the effects of past racial discrimination, there is little doubt that Georgia's true interest was to satisfy the Justice Department's preclearance demands. Even if compliance with the Act, standing alone, could provide a compelling interest, it cannot do so here, where the district was not reasonably necessary under a constitutional reading and application of the Act. To say that the plan was required in order to obtain preclearance is not to say that it was required by the Act's substantive requirements. Georgia's two earlier plans were ameliorative and could not have violated § 5 unless they so discriminated on the basis of race or color as to violate the Constitution. However, instead of grounding its objections on evidence of a discriminatory purpose, the Justice Department appears to have been driven by its maximization policy. In utilizing § 5 to require States to create majority-minority districts whenever possible, the Department expanded its statutory authority beyond Congress' intent for § 5: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The policy also raises serious constitutional concerns because its implicit command that States may engage in presumptive unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' Fifteenth Amendment authority, into tension with the Fourteenth Amendment. Pp. 920–927.

864 F. Supp. 1354, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 928. STEVENS, J., filed a dissenting opinion, *post*, p. 929. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined, and in which SOUTER, J., joined except as to Part III–B, *post*, p. 934.

David F. Walbert, Special Assistant Attorney General of Georgia, argued the cause for the state and private appellants. With him on the briefs for appellants Miller et al. were *Michael J. Bowers*, Attorney General, and *Dennis R. Dunn*, Senior Assistant Attorney General. *Solicitor General Days* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Patrick, Deputy Solicitor General Bender, James A. Feldman, Steven H. Rosenbaum,* and *Miriam R. Eisenstein. Laughlin McDonald, Neil Bradley, Elaine R. Jones, Theodore M. Shaw, Norman J. Chachkin, Jacqueline A. Berrien,* and *Gerald R. Weber* filed briefs for appellants Abrams et al.

A. Lee Parks argued the cause for appellees. With him on the brief was *Larry H. Chesin.*†

JUSTICE KENNEDY delivered the opinion of the Court.

The constitutionality of Georgia's congressional redistricting plan is at issue here. In *Shaw* v. *Reno,* 509 U. S. 630 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw*, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

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†Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Dan Morales,* Attorney General of Texas, *Jorge Vega,* First Assistant Attorney General, and *Renea Hicks,* State Solicitor, and *Michael F. Easley,* Attorney General of North Carolina; for the Congressional Black Caucus by *A. Leon Higginbotham, Jr.;* for the Democratic National Committee et al. by *Wayne Arden* and *Donald J. Simon;* for the Georgia Association of Black Elected Officials by *Eben Moglen* and *Pamela S. Karlan;* for the Lawyers' Committee for Civil Rights Under Law by *Michael A. Cooper, Herbert J. Hansell, Thomas J. Henderson, Brenda Wright, J. Gerald Hebert, Nicholas deB. Katzenbach,* and *Alan E. Kraus;* for the Mexican American Legal Defense and Educational Fund et al. by *Charisse R. Lillie, Karen Narasaki, Wade Henderson, Dennis Courtland Hayes, Kim Gandy, Deborah Ellis, Rodney G. Gregory, Elliot Mincberg,* and *Donna R. Lenhoff;* and for the National Voting Rights Institute by *Jamin Raskin.*

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League by *F. Peter Phillips, Jeffrey P. Sinensky, Steven M. Freeman, Debbie N. Kaminer,* and *Martin E. Karlinsky;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for Ruth O. Shaw et al. by *Robinson O. Everett* and *Clifford Dougherty.*

William C. Owens, Jr., filed a brief for A. J. Pate as *amicus curiae.*

I

A

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. Its central mandate is racial neutrality in governmental decisionmaking. See, *e. g., Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964); see also *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Though application of this imperative raises difficult questions, the basic principle is straightforward: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . . This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265, 291 (1978) (opinion of Powell, J.). This rule obtains with equal force regardless of "the race of those burdened or benefited by a particular classification." *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 494 (1989) (plurality opinion) (citations omitted); *id.,* at 520 (SCALIA, J., concurring in judgment) ("I agree . . . with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"); see also *Adarand Constructors, Inc.* v. *Peña, ante,* at 224; *Bakke, supra,* at 289–291 (opinion of Powell, J.). Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest. See, *e. g., Adarand, ante,* at 227; *Croson, supra,* at 494 (plurality opinion); *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 274, 280, and n. 6 (1986) (plurality opinion).

In *Shaw* v. *Reno, supra,* we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task. Our analysis began from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Id.*, at 642. This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but " 'unexplainable on grounds other than race.' " *Id.*, at 644 (quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)). Applying this basic equal protection analysis in the voting rights context, we held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' . . . demands the same close scrutiny that we give other state laws that classify citizens by race." 509 U. S., at 644 (quoting *Arlington Heights, supra,* at 266).

This litigation requires us to apply the principles articulated in *Shaw* to the most recent congressional redistricting plan enacted by the State of Georgia.

B

In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act (Act), 79 Stat. 438, as amended, 42 U. S. C. § 1973b(b). 30 Fed. Reg. 9897 (1965); see 28 CFR pt. 51, App.; see also *City of Rome* v. *United States*, 446 U. S. 156, 161 (1980). In consequence, § 5 of the Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U. S. C. § 1973c. The preclearance mechanism applies to congressional redistricting plans, see, *e. g., Beer* v. *United States,* 425 U. S. 130, 133 (1976), and requires that the proposed change "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer, supra,* at 141.

Between 1980 and 1990, one of Georgia's 10 congressional districts was a majority-black district, that is, a majority of the district's voters were black. The 1990 Decennial Census indicated that Georgia's population of 6,478,216 persons, 27% of whom are black, entitled it to an additional eleventh congressional seat, App. 9, prompting Georgia's General Assembly to redraw the State's congressional districts. Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with §§ 2 and 5 of the Act, 42 U. S. C. §§ 1973, 1973c. See App. 11–12. Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents. *Id.,* at 12.

A special session opened in August 1991, and the General Assembly submitted a congressional redistricting plan to the Attorney General for preclearance on October 1, 1991. The legislature's plan contained two majority-minority districts, the Fifth and Eleventh, and an additional district, the Second, in which blacks comprised just over 35% of the voting age population. Despite the plan's increase in the number of majority-black districts from one to two and the absence of any evidence of an intent to discriminate against minority voters, 864 F. Supp. 1354, 1363, and n. 7 (SD Ga. 1994), the

Department of Justice refused preclearance on January 21, 1992. App. 99–107. The Department's objection letter noted a concern that Georgia had created only two majority-minority districts, and that the proposed plan did not "recognize" certain minority populations by placing them in a majority-black district. *Id.*, at 105, 105–106.

The General Assembly returned to the drawing board. A new plan was enacted and submitted for preclearance. This second attempt assigned the black population in Central Georgia's Baldwin County to the Eleventh District and increased the black populations in the Eleventh, Fifth, and Second Districts. The Justice Department refused preclearance again, relying on alternative plans proposing three majority-minority districts. *Id.*, at 120–126. One of the alternative schemes relied on by the Department was the so-called "max-black" plan, 864 F. Supp., at 1360, 1362–1363, drafted by the American Civil Liberties Union (ACLU) for the General Assembly's black caucus. The key to the ACLU's plan was the "Macon/Savannah trade." The dense black population in the Macon region would be transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population would be offset by extending the Eleventh to include the black populations in Savannah. *Id.*, at 1365–1366. Pointing to the General Assembly's refusal to enact the Macon/Savannah swap into law, the Justice Department concluded that Georgia had "failed to explain adequately" its failure to create a third majority-minority district. App. 125. The State did not seek a declaratory judgment from the District Court for the District of Columbia. 864 F. Supp., at 1366, n. 11.

Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance. *Id.*, at 1366. Using the ACLU's "max-black" plan as its benchmark, *id.*, at 1366–1367, the General Assembly enacted a plan that

> "bore all the signs of [the Justice Department's] involvement: The black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties, 23 more than the existing congressional districts." *Id.*, at 1367.

See Appendix A, *infra*, following p. 928. The new plan also enacted the Macon/Savannah swap necessary to create a third majority-black district. The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political, and economic makeup of the Eleventh District tells a tale of disparity, not community. See 864 F. Supp., at 1376–1377, 1389–1390; Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). As the appendices to this opinion attest,

> "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." 864 F. Supp., at 1389 (footnote omitted).
>
> "The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way." *Id.*, at 1367 (footnote omitted).

The Almanac of American Politics has this to say about the Eleventh District: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." M. Barone & G. Ujifusa, Almanac of American Politics 356 (1994). Georgia's plan included three majority-black districts, though, and received Justice Department preclearance on April 2, 1992. Plaintiff's Exh. No. 6; see 864 F. Supp., at 1367.

Elections were held under the new congressional redistricting plan on November 4, 1992, and black candidates were elected to Congress from all three majority-black districts. *Id.*, at 1369. On January 13, 1994, appellees, five white voters from the Eleventh District, filed this action against various state officials (Miller Appellants) in the United States District Court for the Southern District of Georgia. *Id.*, at 1369, 1370. As residents of the challenged Eleventh District, all appellees had standing. See *United States* v. *Hays*, *ante*, at 744–745. Their suit alleged that Georgia's Eleventh District was a racial gerrymander and so a violation of the Equal Protection Clause as interpreted in *Shaw* v. *Reno*. A three-judge court was convened pursuant to 28 U. S. C. § 2284, and the United States and a number of Georgia residents intervened in support of the defendant-state officials.

A majority of the District Court panel agreed that the Eleventh District was invalid under *Shaw*, with one judge dissenting. 864 F. Supp. 1354 (1994). After sharp criticism of the Justice Department for its use of partisan advocates in its dealings with state officials and for its close cooperation with the ACLU's vigorous advocacy of minority district maximization, the majority turned to a careful interpretation of our opinion in *Shaw*. It read *Shaw* to require strict scrutiny whenever race is the "overriding, predominant force" in the redistricting process. 864 F. Supp., at

1372 (emphasis deleted). Citing much evidence of the legislature's purpose and intent in creating the final plan, as well as the irregular shape of the district (in particular several appendages drawn for the obvious purpose of putting black populations into the district), the court found that race was the overriding and predominant force in the districting determination. *Id.*, at 1378. The court proceeded to apply strict scrutiny. Though rejecting proportional representation as a compelling interest, it was willing to assume that compliance with the Act would be a compelling interest. *Id.*, at 1381–1382. As to the latter, however, the court found that the Act did not require three majority-black districts, and that Georgia's plan for that reason was not narrowly tailored to the goal of complying with the Act. *Id.*, at 1392–1393.

Appellants filed notices of appeal and requested a stay of the District Court's judgment, which we granted pending the filing and disposition of the appeals in this litigation, *Miller* v. *Johnson*, 512 U. S. 1283 (1994). We later noted probable jurisdiction. 513 U. S. 1071 (1995); see 28 U. S. C. § 1253.

II

A

Finding that the "evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved," the District Court held that race was the predominant, overriding factor in drawing the Eleventh District. 864 F. Supp., at 1374; see *id.*, at 1374–1378. Appellants do not take issue with the court's factual finding of this racial motivation. Rather, they contend that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw*. They argue that, regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race, and that appellees failed to make that showing here. Appellants' conception of the constitutional violation misapprehends our holding in *Shaw* and the equal protection precedent upon which *Shaw* relied.

Shaw recognized a claim "analytically distinct" from a vote dilution claim. 509 U. S., at 652; see *id.*, at 649–650. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential of racial or ethnic minorities," *Mobile* v. *Bolden,* 446 U. S. 55, 66 (1980) (citing cases), an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54 (1958) *(per curiam),* buses, *Gayle* v. *Browder,* 352 U. S. 903 (1956) *(per curiam),* golf courses, *Holmes* v. *Atlanta,* 350 U. S. 879 (1955) *(per curiam),* beaches, *Mayor of Baltimore* v. *Dawson,* 350 U. S. 877 (1955) *(per curiam),* and schools, *Brown* v. *Board of Education,* 347 U. S. 483 (1954), so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class."'" *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547, 602 (1990) (O'CONNOR, J., dissenting) (quoting *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris,* 463 U. S. 1073, 1083 (1983)); cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U. S. 656, 666 (1993) ("'injury in fact'" was "denial of equal treatment . . . , not the ultimate inability to obtain the benefit"). When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw, supra,* at 647; see *Metro Broadcasting, supra,* at 636 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting, supra,* at 604 (O'CONNOR, J., dissenting) (citation omitted); see *Powers* v. *Ohio,* 499 U. S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence"); *Palmore* v. *Sidoti,* 466 U. S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"). They also cause society serious harm. As we concluded in *Shaw:*

> "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny." *Shaw, supra,* at 657.

Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, 509 U. S., at 649, a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting. See *Shaw* v. *Hunt*, 861 F. Supp. 408, 431 (EDNC 1994); *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1195 (WD La. 1993), vacated, 512 U. S. 1230 (1994); but see *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1413 (ED Cal. 1994).

Our reasoning in *Shaw* compels this conclusion. We recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object. 509 U. S., at 644. In the rare case, where the effect of government action is a pattern "'unexplainable on grounds other than race,'" *ibid.* (quoting *Arlington Heights*, 429 U. S., at 266), "[t]he evidentiary inquiry is . . . relatively easy," *Arlington Heights, supra*, at 266 (footnote omitted). As early as *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Court recognized that a laundry permit ordinance was administered in a deliberate way to exclude all Chinese from the laundry business; and in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court concluded that the redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks. Even in those cases, however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation. Patterns of discrimination as conspicuous as these are rare, and are not a necessary predicate to a violation of the Equal Protection Clause. Cf. *Arlington Heights, supra,* at 266, n. 14. In the absence of a pattern as stark as those in *Yick Wo* or *Gomillion,* "impact alone is not determinative, and the Court must look to other evidence" of race-based decisionmaking. *Arlington Heights, supra,* at 266 (footnotes omitted).

Shaw applied these same principles to redistricting. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw, supra,* at 646–647 (quoting *Gomillion, supra,* at 341). In other cases, where the district is not so bizarre on its face that it discloses a racial design, the proof will be more "difficul[t]." 509 U. S., at 646. Although it was not necessary in *Shaw* to consider further the proof required in these more difficult cases, the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim.

Appellants and some of their *amici* argue that the Equal Protection Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids. It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," *Metro Broadcasting,* 497 U. S., at 636 (KENNEDY, J., dissenting), the precise use of race as a proxy the Constitution prohibits. Nor can the argument that districting cases are excepted from standard equal protection precepts be resuscitated by *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S.

144 (1977), where the Court addressed a claim that New York violated the Constitution by splitting a Hasidic Jewish community in order to include additional majority-minority districts. As we explained in *Shaw*, a majority of the Justices in *UJO* construed the complaint as stating a vote dilution claim, so their analysis does not apply to a claim that the State has separated voters on the basis of race. 509 U. S., at 652. To the extent any of the opinions in that "highly fractured decision," *id.*, at 651, can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not be deemed controlling.

In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. Today's litigation requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge.

B

Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State." *Chapman* v. *Meier*, 420 U. S. 1, 27 (1975); see, *e. g., Voinovich* v. *Quilter*, 507 U. S. 146, 156–157 (1993); *Growe* v. *Emison*, 507 U. S. 25, 34 (1993). Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, *e. g., Adarand, ante*, at 218 (citing *Bakke*, 438 U. S., at 291 (opinion of Powell, J.)), until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed, see *id.*, at 318–319 (opinion of Powell, J.). The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. *Shaw, supra,* at 646; see *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 279 (1979) ("'[D]iscriminatory' purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra,* at 647. These principles inform the plaintiff's burden of proof at trial. Of course, courts must also recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil

Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed. See, *e. g.*, Fed. Rules Civ. Proc. 12(b) and (e), 26(b)(2), 56; see also *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 327 (1986).

In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F. Supp., at 1375; see *id.*, at 1374–1376. Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer. See Appendix B, *infra*, following p. 928; see also App. 133. Although this evidence is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a *Shaw* claim that the Eleventh District is unexplainable other than by race. The District Court had before it considerable additional evidence showing that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district in the Second. 864 F. Supp., at 1372, 1378.

The court found that "it became obvious," both from the Justice Department's objection letters and the three preclearance rounds in general, "that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda." *Id.*, at 1366, n. 11; see *id.*, at 1360–1367; see also *Arlington Heights*, 429 U. S., at 267 ("historical background of the decision is one evidentiary source"). It further found that the General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands. The court supported its conclusion not just with the testimony of Linda Meggers, the operator of "Herschel," Georgia's reapportionment computer, and "probably the most knowledgeable person available on the subject of Georgian redistricting," 864 F. Supp., at 1361, 1363, n. 6, 1366, but also with the State's own concessions. The State admitted that it "'would not have added those portions of Effingham and Chatham Counties that are now in the [far southeastern extension of the] present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter.'" *Id.*, at 1377. It conceded further that "[t]o the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district." *Ibid.* And in its brief to this Court, the State concedes that "[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district." Brief for Miller Appellants 30. Hence the trial court had little difficulty concluding that the Justice Department "spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply." 864 F. Supp., at 1377. On this record, we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District; and in any event we conclude the court's finding is not clearly erroneous. Cf. *Wright* v. *Rockefeller*, 376 U. S. 52, 56–57 (1964) (evidence presented "conflicting inferences" and therefore "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines").

In light of its well-supported finding, the District Court was justified in rejecting the various alternative explanations offered for the district. Although a legislature's compliance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" may well suffice to refute a claim of racial gerrymandering, *Shaw*, 509 U. S., at 647, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives. Georgia's Attorney General objected to the Justice Department's demand for three majority-black districts on the ground that to do so the State would have to "violate all reasonable standards of compactness and contiguity." App. 118. This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts, and justified the District Court's finding that "every [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate." 864 F. Supp., at 1384; see *id.*, at 1364, n. 8; *id.*, at 1375 ("While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level").

Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling "that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." *Id.*, at 1389–1390. A comprehensive report demonstrated the fractured political, social, and economic interests within the Eleventh District's black population. See Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). It is apparent that it was not alleged shared interests but rather the object of maximizing the district's black population and obtaining Justice Department approval that in fact explained the General Assembly's actions. 864 F. Supp., at 1366, 1378, 1380. A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw,* 509 U. S., at 646. But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates. *Id.*, at 647; cf. *Powers* v. *Ohio,* 499 U. S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns").

Race was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. 864 F. Supp., at 1372, 1378. As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.

III

To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. *Shaw, supra,* at 653–657; see also *Croson,* 488 U. S., at 494 (plurality opinion); *Wygant,* 476 U. S., at 274, 280, and n. 6 (plurality opinion); cf. *Adarand, ante,* at 227. There is a "significant state interest in eradicating the effects of past racial discrimination." *Shaw, supra,* at 656. The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good reason: There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. 864 F. Supp., at 1378 ("[T]he only interest the General Assembly had in mind when drafting the current congressional plan was satisfying [the Justice Department's] preclearance requirements"); *id.*, at 1366; compare *Wygant, supra*, at 277 (plurality opinion) (under strict scrutiny, State must have convincing evidence that remedial action is necessary before implementing affirmative action), with *Heller* v. *Doe*, 509 U. S. 312, 320 (1993) (under rational-basis review, legislature need not " 'actually articulate at any time the purpose or rationale supporting its classification' ") (quoting *Nordlinger* v. *Hahn*, 505 U. S. 1, 15 (1992)). Whether or not in some cases compliance with the Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. See 509 U. S., at 653–655. The congressional plan challenged here was not required by the Act under a correct reading of the statute.

The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a "black-maximization" policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the "Macon/Savannah trade" and created a third majority-black district. 864 F. Supp., at 1366, 1380. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act.

We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. See, *e. g.*, *Shaw*, *supra*, at 656; *Croson*, *supra*, at 500–501; *Wygant*, *supra*, at 276–277 (plurality opinion). "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, *supra*, at 501. Our presumptive skepticism of all racial classifications, see *Adarand*, *ante*, at 223–224, prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest. See *Shaw*, *supra*, at 654. Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so. See, *e. g.*, *United States* v. *Nixon*, 418 U. S. 683, 704 (1974) (judicial power cannot be shared with Executive Branch); *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); cf. *Baker* v. *Carr*, 369 U. S. 186, 211 (1962) (Supreme Court is "ultimate interpreter of the Constitution"); *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958) ("permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution").

For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, see, *e. g., Presley* v. *Etowah County Comm'n,* 502 U. S. 491, 508–509 (1992), and cases cited therein, we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 574–575 (1988). When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question, see, *e. g., Bakke,* 438 U. S., at 291 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently supect" under the Equal Protection Clause), and should not receive deference.

Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5. Wherever a plan is "ameliorative," a term we have used to describe plans increasing the number of majority-minority districts, it "cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer,* 425 U. S., at 141. Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%). These plans were "ameliorative" and could not have violated § 5's nonretrogression principle. *Ibid.* Acknowledging as much, see Brief for United States 29; 864 F. Supp., at 1384–1385, the United States now relies on the fact that the Justice Department may object to a state proposal either on the ground that it has a prohibited purpose or a prohibited effect, see, *e. g., Pleasant Grove* v. *United*

States, 479 U. S. 462, 469 (1987). The Government justifies its preclearance objections on the ground that the submitted plans violated § 5's purpose element. The key to the Government's position, which is plain from its objection letters if not from its briefs to this Court, compare App. 105–106, 124–125 with Brief for United States 31–33, is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district.

The Government's position is insupportable. "[A]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992). Although it is true we have held that the State has the burden to prove a nondiscriminatory purpose under § 5, *e. g., Pleasant Grove, supra,* at 469, Georgia's Attorney General provided a detailed explanation for the State's initial decision not to enact the max-black plan, see App. 117–119. The District Court accepted this explanation, 864 F. Supp., at 1365, and found an absence of any discriminatory intent, *id.*, at 1363, and n. 7. The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan "so discriminates on the basis of race or color as to violate the Constitution," *Beer, supra,* at 141; see *Mobile* v. *Bolden,* 446 U. S. 55 (1980) (plurality opinion), and thus cannot provide any basis under § 5 for the Justice Department's objection.

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy, see Brief for United States 35, and seems to concede its impropriety, see Tr. of Oral Arg. 32–33, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans.* One of the two Department of Justice line attorneys overseeing the Georgia preclearance process himself disclosed that "'what we did and what I did specifically was to take a . . . map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength.'" 864 F. Supp., at 1362, n. 4. In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

Section 5 was directed at preventing a particular set of invidious practices that had the effect of "undo[ing] or defeat[ing] the rights recently won by nonwhite voters."

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*See 864 F. Supp. 1354, 1361 (SD Ga. 1994) (quoting Rep. Tyrone Brooks, who recalled on the Assembly Floor that "'the Attorney General . . . specifically told the states covered by the Act that wherever possible, you must draw majority black districts, wherever possible'"); *id.*, at 1362–1363, and n. 4 (citing 3 Tr. 23–24: Assistant Attorney General answering "Yes" to question whether "the Justice Department did take the position in a number of these cases, that if alternative plans demonstrated that more minority districts could be drawn than the state was proposing to draw . . . that did, in fact, violate Section 2 of the Voting Rights Act?"); 864 F. Supp., at 1365–1366; *id.*, at 1366, n. 11 ("It became obvious that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda"); *id.*, at 1368 ("It apparently did not occur to [the Justice Department] that increased 'recognition' of minority voting strength, while perhaps admirable, is properly tempered with other districting considerations"); *id.*, at 1382–1383 (expressing doubts as to the constitutionality of [the Justice Department's] "'maximization' policy"); *id.*, at 1383, n. 35 (citing other courts that have "criticize[d] [the Justice Department's] maximization propensities").

H. R. Rep. No. 91–397, p. 8 (1969). As we explained in *Beer* v. *United States,*

> "'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."'" 425 U. S., at 140 (quoting H. R. Rep. No. 94–196, pp. 57–58 (1975) (footnotes omitted)).

Based on this historical understanding, we recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U. S., at 141. The Justice Department's maximization policy seems quite far removed from this purpose. We are especially reluctant to conclude that § 5 justifies that policy given the serious constitutional concerns it raises. In *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some States' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.,* at 335 (footnote omitted); see also *City of Rome* v. *United States,* 446 U. S., at 173–183. But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this litigation. And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, *Katzenbach, supra,* at 327, 337, into tension with the Fourteenth Amendment. As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must " 'consist with the letter and spirit of the constitution.' " 383 U. S., at 326 (quoting *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819)). We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises. See, *e. g., DeBartolo Corp.* v. *Florida Gulf Coast Trades Council,* 485 U. S., at 575.

IV

The Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmondson* v. *Leesville Concrete Co.,* 500 U. S. 614, 630–631 (1991). It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

* * *

The judgment of the District Court is affirmed, and the cases are remanded for further proceedings consistent with this decision.

It is so ordered.

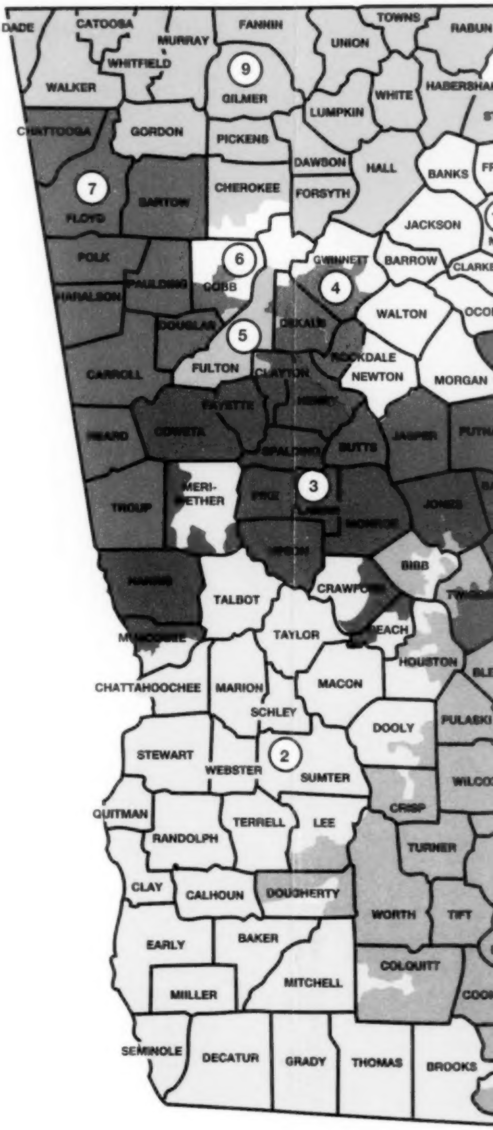
[Appendices A and B, containing a map of Georgia congressional districts and a population density map of the 11th Congressional District of Georgia, follow this page.]

JUSTICE O'CONNOR, concurring.

I understand the threshold standard the Court adopts—that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *ante,* at 916—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.

Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been

APPENDIX A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FANNIN
UNION
TOWNS
RABUN
WHITFIELD
9
WALKER
GILMER
WHITE
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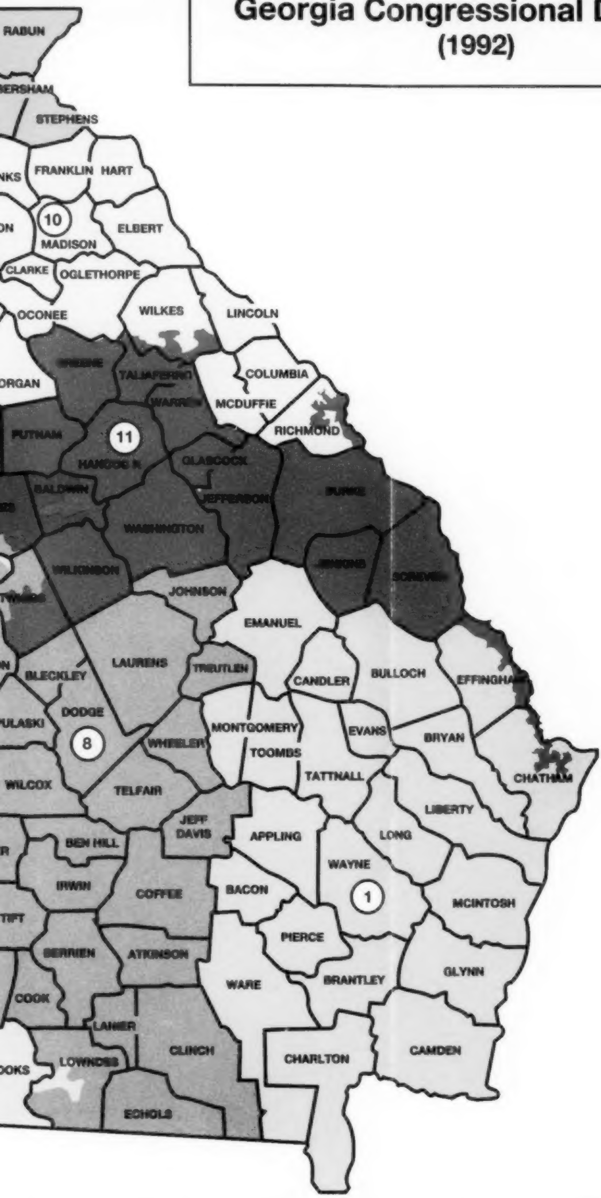
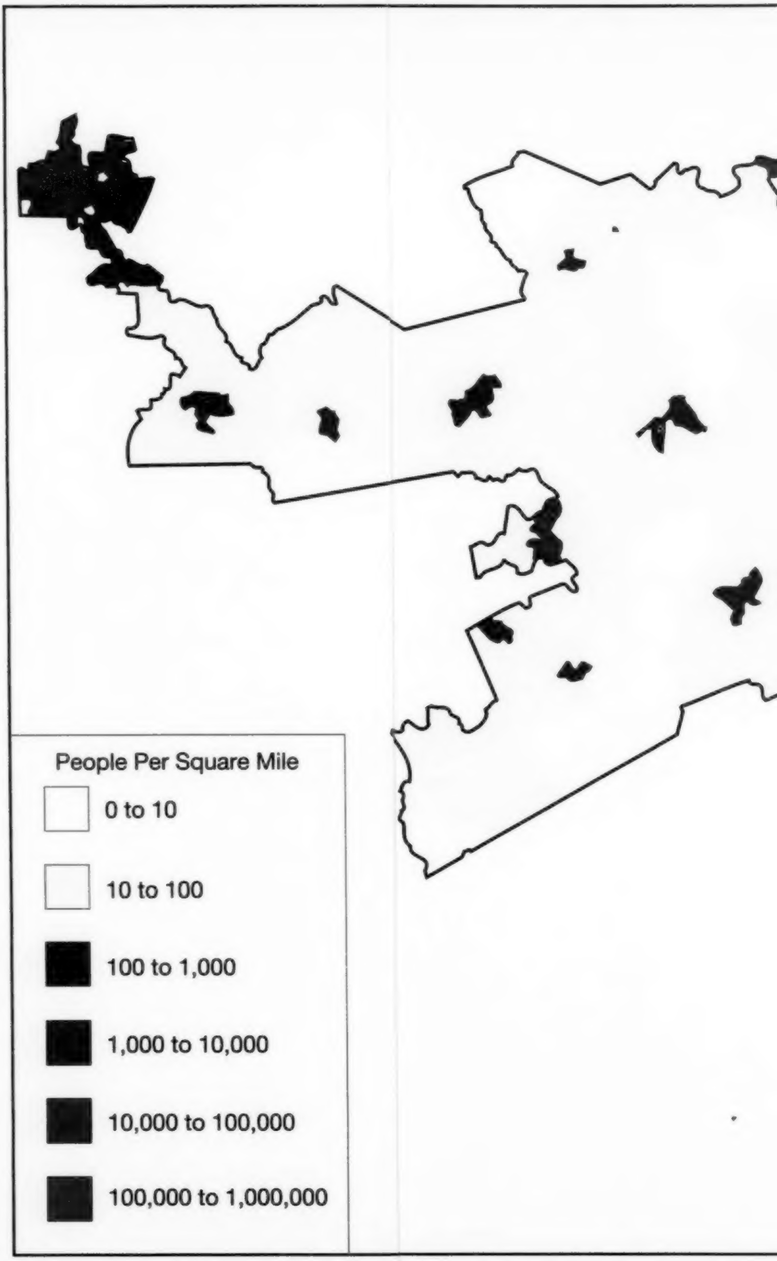
GORDON
PICKENS
DAWSON
HALL
BANKS
7
FLOYD
BARTOW
CHEROKEE
FORSYTH
JACKSON
POLK
6
GWINNETT
BARROW
CLARKE
PAULDING
COBB
4
HARALSON
WALTON
DOUGLAS
DEKALB
5
ROCKDALE
CARROLL
FULTON
CLAYTON
NEWTON
MORGAN
FAYETTE
HENRY
HEARD
COWETA
BUTTS
JASPER
SPALDING
3
MERI-WETHER
TROUP
PIKE
LAMAR
MONROE
JONES
UPSON
BIBB
HARRIS
CRAWFORD
TALBOT
PEACH
TAYLOR
MUSCOGEE
HOUSTON
CHATTAHOOCHEE
MARION
MACON
SCHLEY
DOOLY
PULASKI
STEWART
2
WEBSTER
SUMTER
WILCOX
CRISP
QUITMAN
TERRELL
LEE
RANDOLPH
TURNER
CLAY
CALHOUN
DOUGHERTY
WORTH
TIFT
EARLY
BAKER
COLQUITT
MILLER
MITCHELL
SEMINOLE
DECATUR
GRADY
THOMAS
BROOKS

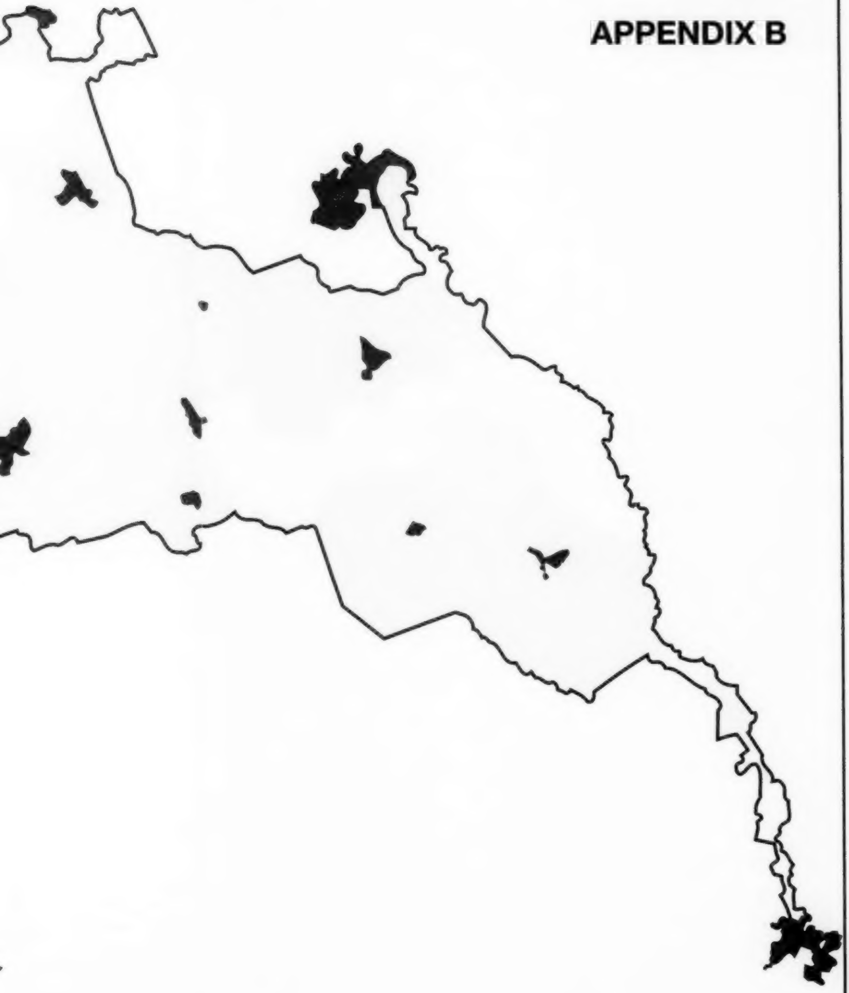
Georgia Congressional Districts
(1992)


RABUN
ERSHAM
STEPHENS
NKS
FRANKLIN
HART
10
ON
MADISON
ELBERT
CLARKE
OGLETHORPE
OCONEE
WILKES
LINCOLN
ORGAN
GREENE
TALIAFERRO
COLUMBIA
WARREN
MCDUFFIE
PUTNAM
11
HANCOCK
RICHMOND
GLASCOCK
BALDWIN
JEFFERSON
BURKE
WASHINGTON
WILKINSON
JENKINS
SCREVEN
TWIGGS
JOHNSON
EMANUEL
LAURENS
TREUTLEN
BLECKLEY
CANDLER
BULLOCH
EFFINGHAM
DODGE
ULASKI
MONTGOMERY
EVANS
BRYAN
8
WHEELER
TOOMBS
TATTNALL
CHATHAM
WILCOX
TELFAIR
LIBERTY
JEFF DAVIS
BEN HILL
APPLING
LONG
WAYNE
IRWIN
COFFEE
BACON
1
MCINTOSH
TIFT
PIERCE
BERRIEN
ATKINSON
GLYNN
WARE
BRANTLEY
COOK
LANIER
CLINCH
CAMDEN
CHARLTON
OOKS
LOWNDES
ECHOLS


People Per Square Mile
0 to 10
10 to 100
100 to 1,000
1,000 to 10,000
10,000 to 100,000
100,000 to 1,000,000

Population Density Map
11th Congressional District of Georgia

APPENDIX B



considered in the redistricting process. See *Shaw* v. *Reno*, 509 U. S. 630, 646 (1993); *ante*, at 916. But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

JUSTICE STEVENS, dissenting.

JUSTICE GINSBURG has explained why the District Court's opinion on the merits was erroneous and why this Court's law-changing decision will breed unproductive litigation. I join her excellent opinion without reservation. I add these comments because I believe the appellees in these cases, like the appellees in *United States* v. *Hays*, *ante*, p. 737, have not suffered any legally cognizable injury.

In *Shaw* v. *Reno*, 509 U. S. 630 (1993), the Court crafted a new cause of action with two novel, troubling features. First, the Court misapplied the term "gerrymander," previously used to describe grotesque line-drawing by a dominant group to maintain or enhance its political power at a minority's expense, to condemn the efforts of a majority (whites) to share its power with a minority (African-Americans). Second, the Court dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters, but it failed to explain adequately what showing a plaintiff must make to establish standing to litigate the newly minted *Shaw* claim. Neither in *Shaw* itself nor in the cases decided today has the Court coherently articulated what injury this cause of action is designed to redress. Because appellees have alleged no legally cognizable injury, they lack standing, and these cases should be dismissed. See *Hays*, *ante*, at 750–751 (STEVENS, J., concurring in judgment).

Even assuming the validity of *Shaw*, I cannot see how appellees in these cases could assert the injury the Court attributes to them. Appellees, plaintiffs below, are white voters in Georgia's Eleventh Congressional District. The Court's conclusion that they have standing to maintain a *Shaw* claim appears to rest on a theory that their placement in the Eleventh District caused them " 'representational harms.' " *Hays, ante,* at 744, cited *ante,* at 909. The *Shaw* Court explained the concept of "representational harms" as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw,* 509 U. S., at 648. Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Appellees' standing, in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race " 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Ante,* at 912 (quoting *Shaw,* 509 U. S., at 647). This generalization, as the Court recognizes, is "offensive and demeaning." *Ante,* at 912.

In particular instances, of course, members of one race may vote by an overwhelming margin for one candidate, and in some cases that candidate will be of the same race. "Racially polarized voting" is one of the circumstances plaintiffs must prove to advance a vote dilution claim. *Thornburg* v. *Gingles,* 478 U. S. 30, 56–58 (1986). Such a claim allows voters to allege that gerrymandered district lines have impaired their ability to elect a candidate of their own race. The Court emphasizes, however, that a so-called *Shaw* claim is " 'analytically distinct' from a vote dilution claim," *ante,* at 911 (quoting *Shaw,* 509 U. S., at 652). Neither in *Shaw,* nor in *Hays,* nor in the instant cases has the Court answered the question its analytic distinction raises: If the *Shaw* injury does not flow from an increased probability that white candidates will lose, then how can the increased probability that black candidates will win cause white voters, such as appellees, cognizable harm?[1]

The Court attempts an explanation in these cases by equating the injury it imagines appellees have suffered with the injuries African-Americans suffered under segregation. The heart of appellees' claim, by the Court's account, is that "a State's assignment of voters on the basis of race," *ante*, at 915, violates the Equal Protection Clause for the same reason a State may not "segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) *(per curiam)*, buses, *Gayle* v. *Browder*, 352 U. S. 903 (1956) *(per curiam)*, golf courses, *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) *(per curiam)*, beaches, *Mayor of Baltimore* v. *Dawson*, 350 U. S. 877 (1955) *(per curiam)*, and schools, *Brown* v. *Board of Education*, 347 U. S. 483 (1954)." *Ante*, at 911. This equation, however, fails to elucidate the elusive *Shaw* injury. Our desegregation cases redressed the *exclusion* of black citizens from public facilities reserved for whites. In these cases, in contrast, any voter, black or white, may live in the Eleventh District. What appellees contest is the *inclusion* of too many black voters in the district as drawn. In my view, if appellees allege no vote dilution, that inclusion can cause them no conceivable injury.

The Court's equation of *Shaw* claims with our desegregation decisions is inappropriate for another reason. In each of those cases, legal segregation frustrated the public interest in diversity and tolerance by barring African-Americans from joining whites in the activities at issue. The districting plan here, in contrast, serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates. See *post,* at 947–948 (GINSBURG, J., dissenting). "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc.* v. *Peña, ante,* at 243 (STEVENS, J., dissenting); see also *Adarand, ante,* at 247–248, n. 5 (STEVENS, J., dissenting). That racial integration of the sort attempted by Georgia now appears more vulnerable to judicial challenge than some policies alleged to perpetuate racial bias, cf. *Allen* v. *Wright,* 468 U. S. 737 (1984), is anomalous, to say the least.

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[1] White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw:* the stigma blacks supposedly suffer when assigned to a district because of their race. See *Hays*, *ante*, at 744; cf. *Adarand Constructors, Inc.* v. *Peña*, *ante*, at 247–248, n. 5 (STEVENS, J., dissenting).

Equally distressing is the Court's equation of traditional gerrymanders, designed to maintain or enhance a dominant group's power, with a dominant group's decision to share its power with a previously underrepresented group. In my view, districting plans violate the Equal Protection Clause when they "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher* v. *Daggett,* 462 U. S. 725, 748 (1983) (STEVENS, J., concurring). In contrast, I do not see how a districting plan that favors a politically weak group can violate equal protection. The Constitution does not mandate any form of proportional representation, but it certainly permits a State to adopt a policy that promotes fair representation of different groups. Indeed, this Court squarely so held in *Gaffney* v. *Cummings,* 412 U. S. 735 (1973):

> "[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise

> within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Id.*, at 754.

The Court's refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting, given that African-Americans and other disadvantaged groups have struggled so long and so hard for inclusion in that most central exercise of our democracy. See *post*, at 936–938 (GINSBURG, J., dissenting). I have long believed that treating racial groups differently from other identifiable groups of voters, as the Court does today, is itself an invidious racial classification. Racial minorities should receive neither more nor less protection than other groups against gerrymanders.[2] *A fortiori*, racial minorities should not be less eligible than other groups to benefit from districting plans the majority designs to aid them.

I respectfully dissent.

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[2] "In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting).

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins except as to Part III–B, dissenting.

Legislative districting is highly political business. This Court has generally respected the competence of state legislatures to attend to the task. When race is the issue, however, we have recognized the need for judicial intervention to prevent dilution of minority voting strength. Generations of rank discrimination against African-Americans, as citizens and voters, account for that surveillance.

Two Terms ago, in *Shaw* v. *Reno*, 509 U. S. 630 (1993), this Court took up a claim "analytically distinct" from a vote dilution claim. *Id.*, at 652. *Shaw* authorized judicial intervention in "extremely irregular" apportionments, *id.*, at 642, in which the legislature cast aside traditional districting practices to consider race alone—in the *Shaw* case, to create a district in North Carolina in which African-Americans would compose a majority of the voters.

Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominant[ly] motivat[ed]" by race: "[S]trict scrutiny" will be triggered not only when traditional districting practices are abandoned, but also when those practices are "subordinated to"—given less weight than—race. See *ante*, at 916. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices. Because I do not endorse the Court's new standard and would not upset Georgia's plan, I dissent.

I

At the outset, it may be useful to note points on which the Court does not divide. First, we agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. See *ante,* at 915; *Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination . . . ."). Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. See, *e. g., Thornburg* v. *Gingles,* 478 U. S. 30 (1986); *White* v. *Regester,* 412 U. S. 755 (1973). Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw* v. *Reno,* 92 Mich. L. Rev. 483, 496 (1993) ("compliance with the [Voting Rights Act] and *Gingles* necessarily requires race-conscious districting"). Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together. See *Shaw,* 509 U. S., at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Therefore, the fact that the Georgia General Assembly took account of race in drawing district lines—a fact not in dispute—does not render the State's plan invalid. To offend the Equal Protection Clause, all agree, the legislature had to do more than consider race. How much more, is the issue that divides the Court today.

A

"We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975); see also *ante,* at 915. The Constitution itself allocates this responsibility to States. U. S. Const., Art. I, §2; *Growe* v. *Emison,* 507 U. S. 25, 34 (1993).

"Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White* v. *Weiser,* 412 U. S. 783, 795–796 (1973). District lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.

B

Federal courts have ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights—rights denied in many States, including Georgia, until not long ago.

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied . . . by any State on account of race." That declaration, for generations, was often honored in the breach; it was greeted by a near century of "unremitting and ingenious defiance" in several States, including Georgia. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 309 (1966). After a brief interlude of black suffrage enforced by federal troops but accompanied by rampant violence against blacks, Georgia held a constitutional convention in 1877. Its purpose, according to the convention's leader, was to "'fix it so that the people shall rule and the Negro shall never be heard from.'" McDonald, Binford, & Johnson, Georgia, in Quiet Revolution in the South 68 (C. Davidson & B. Grofman eds. 1994) (quoting Robert Toombs). In pursuit of this objective, Georgia enacted a cumulative poll tax, requiring voters to show they had paid past as well as current poll taxes; one historian described this tax as the "most effective bar to Negro suffrage ever devised." A. Stone, Studies in the American Race Problem 354–355 (1908).

In 1890, the Georgia General Assembly authorized "white primaries"; keeping blacks out of the Democratic primary effectively excluded them from Georgia's political life, for victory in the Democratic primary was tantamount to election. McDonald, Binford, & Johnson, *supra,* at 68–69. Early in this century, Georgia Governor Hoke Smith persuaded the legislature to pass the "Disenfranchisement Act of 1908"; true to its title, this measure added various property, "good character," and literacy requirements that, as administered, served to keep blacks from voting. *Id.*, at 69; see also *Katzenbach,* 383 U. S., at 310 (tests of this order were "specifically designed to prevent Negroes from voting"). The result, as one commentator observed 25 years later, was an "'almost absolute exclusion of the Negro voice in state and federal elections.'" McDonald, Binford, & Johnson, *supra,* at 70 (quoting R. Wardlaw, Negro Suffrage in Georgia, 1867–1930, p. 69 (unpublished 1932)).

Faced with a political situation scarcely open to self-correction—disenfranchised blacks had no electoral influence, hence no muscle to lobby the legislature for change—the Court intervened. It invalidated white primaries, see *Smith* v. *Allwright,* 321 U. S. 649 (1944), and other burdens on minority voting. See, *e. g., Schnell* v. *Davis,* 336 U. S. 933 (1949) *(per curiam)* (discriminatory application of voting tests); *Lane* v. *Wilson,* 307 U. S. 268 (1939) (procedural hurdles); *Guinn* v. *United States,* 238 U. S. 347 (1915) (grandfather clauses).

It was against this backdrop that the Court, construing the Equal Protection Clause, undertook to ensure that apportionment plans do not dilute minority voting strength. See, *e. g., Rogers* v. *Lodge,* 458 U. S. 613, 617 (1982); *Regester,* 412 U. S., at 765; *Wright* v. *Rockefeller,* 376 U. S. 52, 57 (1964). By enacting the Voting Rights Act of 1965, Congress heightened federal judicial involvement in apportionment, and also fashioned a role for the Attorney General. Section 2 creates a federal right of action to challenge vote dilution. Section 5 requires States with a history of discrimination to preclear any changes in voting practices with either a federal court (a three-judge United States District Court for the District of Columbia) or the Attorney General.

These Court decisions and congressional directions significantly reduced voting discrimination against minorities. In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority-minority district.[1] This voting district, however, was not gained easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district—an omission due in part to the influence of Joe Mack Wilson, then Chairman of the Georgia House Reapportionment Committee. As Wilson put it only 14 years ago, "'I don't want to draw nigger districts.'" *Busbee* v. *Smith,* 549 F. Supp. 494, 501 (DC 1982).

II

A

Before *Shaw* v. *Reno,* 509 U. S. 630 (1993), this Court invoked the Equal Protection Clause to justify intervention in the quintessentially political task of legislative districting in two circumstances: to enforce the one-person-one-vote requirement, see *Reynolds* v. *Sims,* 377 U. S. 533 (1964); and to prevent dilution of a minority group's voting strength, see *Regester*, 412 U. S., at 765; *Wright*, 376 U. S., at 57.[2]

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[1] Georgia's population is approximately 27 percent black. 864 F. Supp. 1354, 1385 (SD Ga. 1994).

In *Shaw*, the Court recognized a third basis for an equal protection challenge to a State's apportionment plan. The Court wrote cautiously, emphasizing that judicial intervention is exceptional: Strict judicial scrutiny is in order, the Court declared, if a district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 509 U. S., at 642.

"[E]xtrem[e] irregular[ity]" was evident in *Shaw*, the Court explained, setting out this description of the North Carolina voting district under examination:

> "It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that '"[i]f you drove down the interstate with both car

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[2] In the vote dilution category, *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), was a pathmarker. There, the city of Tuskegee redrew its boundaries to exclude black voters. This apportionment was unconstitutional not simply because it was motivated by race, but notably because it had a dilutive effect: It disenfranchised Tuskegee's black community. See *id.*, at 341 ("The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.").

> doors open, you'd kill most of the people in the district."' Washington Post, Apr. 20, 1993, p. A4. The district even has inspired poetry: 'Ask not for whom the line is drawn; it is drawn to avoid thee.' Grofman, Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing'?, 14 Cardozo L. Rev. 1237, 1261, n. 96 (1993) (internal quotation marks omitted)." *Id.*, at 635–636 (some citations and internal quotation marks omitted).

The problem in *Shaw* was not the plan architects' consideration of race as relevant in redistricting. Rather, in the Court's estimation, it was the virtual exclusion of other factors from the calculus. Traditional districting practices were cast aside, the Court concluded, with race alone steering placement of district lines.

B

The record before us does not show that race similarly overwhelmed traditional districting practices in Georgia. Although the Georgia General Assembly prominently considered race in shaping the Eleventh District, race did not crowd out all other factors, as the Court found it did in North Carolina's delineation of the *Shaw* district.

In contrast to the snake-like North Carolina district inspected in *Shaw*, Georgia's Eleventh District is hardly "bizarre," "extremely irregular," or "irrational on its face." *Id.*, at 642, 644, 658. Instead, the Eleventh District's design reflects significant consideration of "traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons." 864 F. Supp. 1354, 1397, n. 5 (SD Ga. 1994) (Edmondson, J., dissenting); cf. *ante*, at 917 ("geometric shape of the Eleventh District may not seem bizarre on its face"). The district covers a core area in central and eastern Georgia, and its total land area of 6,780 square miles is about average for the State. Defendant's Exh. 177, p. 4.[3] The border of the Eleventh District runs 1,184 miles, in line with Georgia's Second District, which has a 1,243-mile border, and the State's Eighth District, with a border running 1,155 miles. See 864 F. Supp., at 1396 (Edmondson, J., dissenting).[4]

Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the district, 14 are intact and 8 are divided. See Joint Exh. 17. That puts the Eleventh District at about the state average in divided counties. By contrast, of the Sixth District's five counties, none are intact, *ibid.*, and of the Fourth District's four counties, just one is intact. *Ibid.*[5] Seventy-one percent of the Eleventh District's boundaries track the borders of political subdivisions. See 864 F. Supp., at 1396 (Edmondson, J., dissenting). Of the State's 11 districts, 5 score worse than the Eleventh District on this criterion, and 5 score better. See Defendant's Exh. 177, p. 4.[6] Eighty-three percent of the Eleventh District's geographic area is composed of intact counties, above average for the State's congressional districts. 864 F. Supp., at 1396 (Edmondson, J., dissenting).[7] And notably, the Eleventh District's boundaries largely follow precinct lines.[8]

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[3] Georgia's First, Second, and Eighth Districts each have a total area of over 10,100 square miles. 864 F. Supp., at 1396 (Edmondson, J., dissenting).

[4] Although the Eleventh District comes within 58 miles of crossing the entire State, this is not unusual in Georgia: The Ninth District spans the State's entire northern border, and the First, Second, and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State. See *ibid.* (Edmondson, J., dissenting). In the 1980's, Georgia's Eighth District extended even farther, in an irregular pattern from the southeast border with Florida to nearly the Atlanta suburbs. See App. 80.

[5] The First District has 20 intact counties and parts of 2 others. The Second District has 23 intact counties and parts of 12 others. The Third District has 8 intact counties and parts of 8 others. The Fifth District is composed of parts of 4 counties. The Seventh District has 10 intact counties and part of 1 county. The Eighth District has 22 intact counties and parts of 10 others. The Ninth District has 19 intact counties and part of 1 other. The Tenth District has 16 intact counties and parts of 3 others. See Joint Exh. 17.

Evidence at trial similarly shows that considerations other than race went into determining the Eleventh District's boundaries. For a "political reason"—to accommodate the request of an incumbent State Senator regarding the placement of the precinct in which his son lived—the DeKalb County portion of the Eleventh District was drawn to include a particular (largely white) precinct. 2 Tr. 187, 202. The corridor through Effingham County was substantially narrowed at the request of a (white) State Representative. 2 Tr. 189–190, 212–214. In Chatham County, the district was trimmed to exclude a heavily black community in Garden City because a State Representative wanted to keep the city intact inside the neighboring First District. 2 Tr. 218–219. The Savannah extension was configured by "the narrowest means possible" to avoid splitting the city of Port Wentworth. 4 Tr. 172–174, 175–178, 181–183.

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[6] The Sixth District scores lowest, with just 45 percent of its boundaries following political subdivision lines. The Ninth District rates highest, with 91 percent. Defendant's Exh. 177, p. 3.

[7] On this measure, only three districts—the First, Seventh, and Ninth—rate higher than the Eleventh District. Excluding the Fifth and Sixth Districts, which contain no intact counties, the scores range from about 30 percent for the Fourth District to 97 percent for the Seventh District. *Id.*, at 4.

[8] The Court turns the significance of this fact on its head by stating: "'While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level.'" *Ante*, at 919 (quoting 864 F. Supp., at 1384). To this curious comment, one can only demur. Yes, Georgia's plan considered race, but by following precinct lines, it did so in an altogether proper way, *i. e.*, without disregarding traditional districting practices.

Georgia's Eleventh District, in sum, is not an outlier district shaped without reference to familiar districting techniques. Tellingly, the district that the Court's decision today unsettles is not among those on a statistically calculated list of the 28 most bizarre districts in the United States, a study prepared in the wake of our decision in *Shaw*. See Pildes & Niemi, 92 Mich. L. Rev., at 565.

C

The Court suggests that it was not Georgia's Legislature, but the U. S. Department of Justice, that effectively drew the lines, and that Department officers did so with nothing but race in mind. Yet the "Max-Black" plan advanced by the Attorney General was not the plan passed by the Georgia General Assembly.[9] See 864 F. Supp., at 1396–1397, n. 5 (Edmondson, J., dissenting) ("The Max-Black plan did influence to some degree the shape of the ultimate Eleventh District . . . . [But] the actual Eleventh is *not* identical to the Max-Black plan. The Eleventh, to my eye, is significantly different in shape in many ways. These differences show . . . consideration of other matters beyond race . . . .").[10]

And although the Attorney General refused preclearance to the first two plans approved by Georgia's Legislature, the State was not thereby disarmed; Georgia could have demanded relief from the Department's objections by instituting a civil action in the United States District Court for the District of Columbia, with ultimate review in this Court. Instead of pursuing that avenue, the State chose to adopt the plan here in controversy—a plan the State forcefully defends before us. We should respect Georgia's choice by taking its position on brief as genuine.

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[9] Appendixes A, B, and C to this opinion depict, respectively, the proposed Eleventh District under the "Max-Black" plan, Georgia's current congressional districts, and the district in controversy in *Shaw*.

[10] Indeed, a "key" feature, *ante*, at 907, of the "Max-Black" plan—placing parts of Savannah in the Eleventh District—first figured in a proposal adopted by Georgia's Senate even before the Attorney General suggested this course. 864 F. Supp., at 1394, n. 1 (Edmondson, J., dissenting).

D

Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for . . . communities defined by actual shared interests." *Ante,* at 916. The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population." *Ante,* at 919.

But ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life. As stated in a classic study of ethnicity in one city of immigrants:

> "[M]any elements—history, family and feeling, interest, formal organizational life—operate to keep much of New York life channeled within the bounds of the ethnic group. . . .
>
> ". . . The political realm . . . is least willing to consider [ethnicity] a purely private affair. . . .
>
> * * * * *
>
> "[P]olitical life itself emphasizes the ethnic character of the city, with its balanced tickets and its special appeals . . . ." N. Glazer & D. Moynihan, Beyond the Melting Pot 19–20 (1963).

See also, *e. g.,* E. Litt, Beyond Pluralism: Ethnic Politics in America 2 (1970) ("[E]thnic forces play a surprisingly persistent role in our politics."); Ethnic Group Politics, Preface ix (H. Bailey & E. Katz eds. 1969) ("[E]thnic identifications do exist and . . . one cannot really understand the American political process without giving special attention to racial, religious and national minorities.").

To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our

Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example. See, *e. g.*, S. Erie, Rainbow's End: Irish-Americans and the Dilemmas of Urban Machine Politics, 1840–1985, p. 91 (1988) (describing Jersey City's "Horseshoe district" as "lumping most of the city's Irish together"); Coveted Landmarks Add a Twist to Redistricting Task, Los Angeles Times, Sept. 10, 1991, pp. A1, A24 ("In San Francisco in 1961, . . . an Irish Catholic [State Assembly member] 'wanted his district drawn following [Catholic] parish lines so all the parishes where he went to baptisms, weddings and funerals would be in his district' . . . ."); Stone, Goode: Bad and Indifferent, Washington Monthly, July–Aug. 1986, pp. 27, 28 (discussing "The Law of Ethnic Loyalty— . . . a universal law of politics," and identifying "predominantly Italian wards of South Philadelphia," a "Jewish Los Angeles district," and a "Polish district in Chicago"). The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.

III

To separate permissible and impermissible use of race in legislative apportionment, the Court orders strict scrutiny for districting plans "predominantly motivated" by race. No longer can a State avoid judicial oversight by giving—as in this case—genuine and measurable consideration to traditional districting practices. Instead, a federal case can be mounted whenever plaintiffs plausibly allege that other factors carried less weight than race. This invitation to litigate against the State seems to me neither necessary nor proper.

A

The Court derives its test from diverse opinions on the relevance of race in contexts distinctly unlike apportionment.

See *ante*, at 911–912.[11] The controlling idea, the Court says, is "'the simple command [at the heart of the Constitution's guarantee of equal protection] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'" See *ante*, at 911 (quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 602 (1990) (O'CONNOR, J., dissenting)) (some internal quotation marks omitted). But cf. *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1880) (pervading purpose of post-Civil War Amendments was to bar discrimination against once-enslaved race).

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[11] I would follow precedent directly on point. In *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977) *(UJO)*, even though the State "deliberately used race in a purposeful manner" to create majority-minority districts, *id.*, at 165 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.), seven of eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that the districting diluted the majority's voting strength. See *ibid.* (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.); *id.*, at 179–180 (Stewart, J., concurring in judgment, joined by Powell, J.).

Nor is *UJO* best understood as a vote dilution case. Petitioners' claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines.*" *Id.*, at 155 (opinion of White, J., joined by Brennan, Blackmun, and STEVENS, JJ.) (emphasis added). Petitioners themselves stated: "'Our argument is . . . that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.'" *Id.*, at 154, n. 14 (quoting Brief for Petitioners, O. T. 1976, No. 75–104, p. 6, n. 6) (emphasis in Brief for Petitioners).

Though much like the claim in *Shaw*, the *UJO* claim failed because the *UJO* district adhered to traditional districting practices. See 430 U. S., at 168 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.) ("[W]e think it . . . permissible for a State, *employing sound districting principles such as compactness and population equality*, . . . [to] creat[e] districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity of creating districts* in which they will be in the majority.") (emphasis added).

In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups." *Davis* v. *Bandemer*, 478 U. S. 109, 147 (1986) (O'CONNOR, J., concurring in judgment).

That ethnicity defines some of these groups is a political reality. Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. See *supra*, at 944–945. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause." See *Shaw*, 509 U. S., at 679 (STEVENS, J., dissenting).[12]

B

Under the Court's approach, judicial review of the same intensity, *i. e.*, strict scrutiny, is in order once it is determined that an apportionment is predominantly motivated by race. It matters not at all, in this new regime, whether the apportionment dilutes or enhances minority voting strength. As very recently observed, however, "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc.* v. *Peña*, *ante*, at 243 (STEVENS, J., dissenting).

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[12] Race-conscious practices a State may elect to pursue, of course, are not as limited as those it may be required to pursue. See *Voinovich* v. *Quilter*, 507 U. S. 146, 156 (1993) ("[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true . . . .") (citation omitted).

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. See *supra*, at 936–938. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938) (referring to the "more searching judicial inquiry" that may properly attend classifications adversely affecting "discrete and insular minorities"). The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.

State legislatures like Georgia's today operate under federal constraints imposed by the Voting Rights Act—constraints justified by history and designed by Congress to make once-subordinated people free and equal citizens. But these federal constraints do not leave majority voters in need of extraordinary judicial solicitude. The Attorney General, who administers the Voting Rights Act's preclearance requirements, is herself a political actor. She has a duty to enforce the law Congress passed, and she is no doubt aware of the political cost of venturing too far to the detriment of majority voters. Majority voters, furthermore, can press the State to seek judicial review if the Attorney General refuses to preclear a plan that the voters favor. Finally, the Act is itself a political measure, subject to modification in the political process.

C

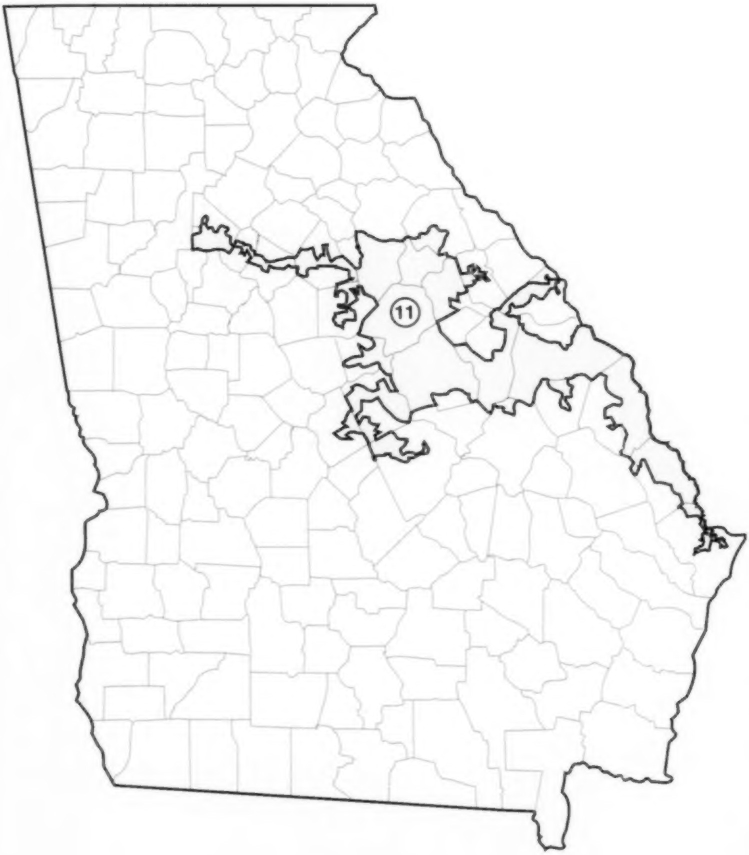
The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. See *supra,* at 935. But today's decision is a counterforce; it opens the way for federal litigation if "traditional . . . districting principles" arguably were accorded less weight than race. See *ante,* at 916. Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw,* to provide a safe harbor. See 509 U. S., at 647 ("[T]raditional districting principles such as compactness, contiguity, and respect for political subdivisions . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."). In view of today's decision, that is no longer the case.

Only after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both—will States now be assured that plans conscious of race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted. The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation. Accordingly, I dissent.

[Appendixes A and B, containing maps of Georgia's proposed and current Eleventh Districts, and Appendix C, containing a map of the *Shaw* v. *Reno* District, follow this page.]

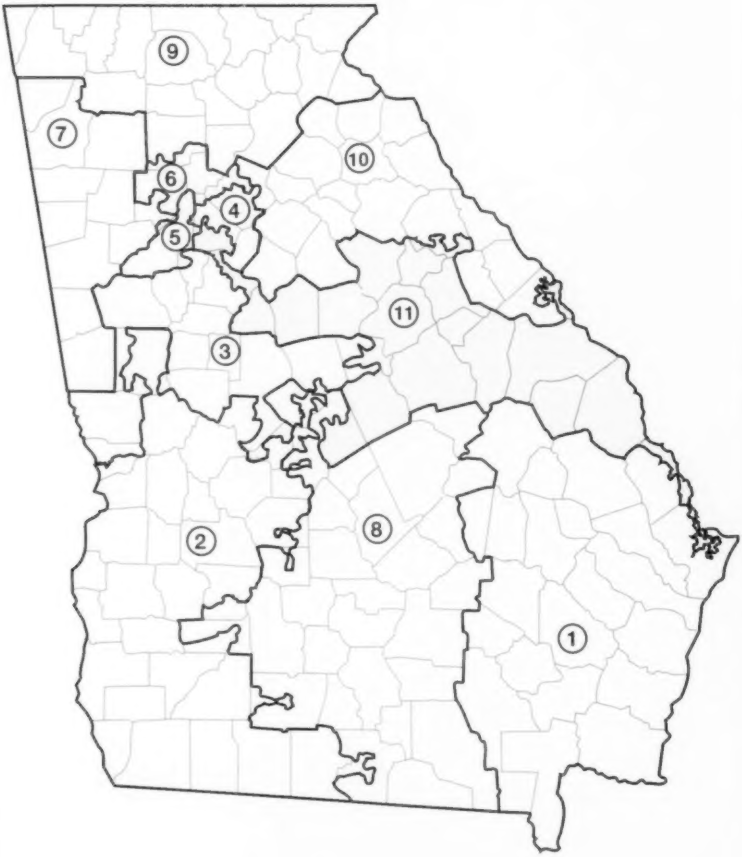
APPENDIX A

Proposed Eleventh District Under "Max-Black" Plan



Georgia

APPENDIX B
Current Congressional Districts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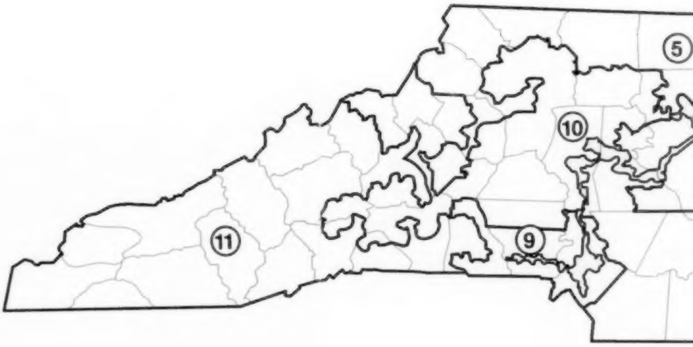
Georgia

APP

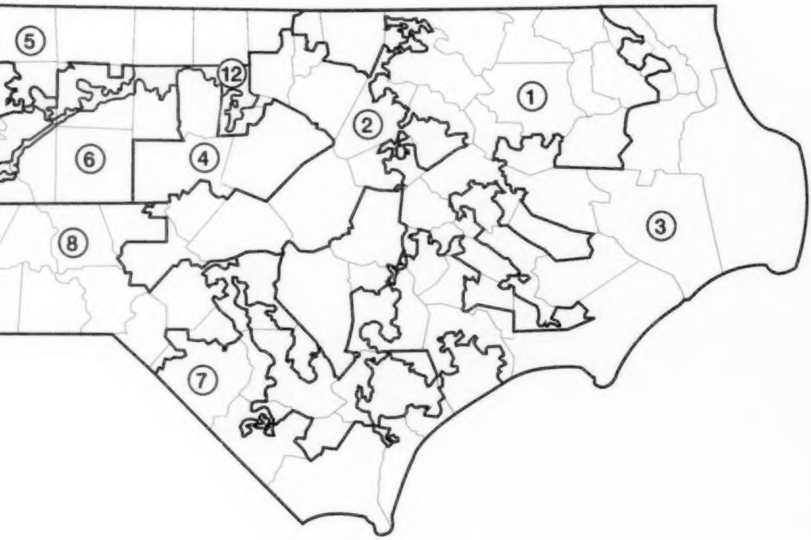
Shaw v.



North Carolina

APPENDIX C

w v. *Reno* District



NETHERLAND, WARDEN *v.* TUGGLE

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A–209. Decided September 1, 1995

On June 29, 1995, the Court of Appeals vacated the District Court's grant of habeas relief to respondent Tuggle, finding all of his constitutional claims meritless. However, the court stayed the issuance of its mandate and granted Tuggle a 30-day stay of execution, pending the filing of a timely petition for certiorari in this Court. It later extended the stay for the full 90 days allowed to file a certiorari petition.

Held: The stay of execution was improvidently granted and is vacated, provided that it shall remain in effect until September 20, 1995, to allow Tuggle's counsel time to seek a further stay in this Court. Since the Court of Appeals' actions were taken by summary order without opinion or discussion, there is no indication that the court attempted to undertake the three-part inquiry required by *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896. This Court has already rejected the Court of Appeals' apparent belief that a capital defendant as a matter of right is entitled to a stay of execution until he has filed a certiorari petition in due course. *E. g., Autry* v. *Estelle*, 464 U. S. 1, 2.

Stay vacated.

PER CURIAM.

Applicant asks that we vacate a stay of execution granted Tuggle by the Court of Appeals for the Fourth Circuit. Because we agree with applicant that the stay was improvidently entered, we grant his application to vacate, provided that the stay shall remain in effect until September 20, 1995, to allow Tuggle's counsel opportunity to seek a further stay in this Court.

On June 29, 1995, the Court of Appeals issued an opinion vacating the District Court's grant of habeas relief, finding all of Tuggle's constitutional claims to be without merit. *Tuggle* v. *Thompson*, 57 F. 3d 1356. The court stayed the issuance of its mandate on August 2, however, and granted Tuggle a 30-day stay of execution pending the filing of a timely petition for certiorari in this Court; then on August

25 it extended the stay of execution for the full 90 days allowed to file a certiorari petition in this Court.

Both actions of the court were taken by summary order without opinion or discussion. Nothing indicates that the Court of Appeals even attempted to undertake the three-part inquiry required by our decision in *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896 (1983). See also *Maggio* v. *Williams*, 464 U. S. 46, 48 (1983) *(per curiam); Autry* v. *Estelle*, 464 U. S. 1, 2–3 (1983) *(per curiam).* There is no hint that the court found that "four Members of th[is] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" or that "a significant possibility of reversal" existed. *Barefoot, supra,* at 895. We think the inescapable conclusion is that the Court of Appeals mistakenly believed that a capital defendant as a matter of right was entitled to a stay of execution until he has filed a petition for certiorari in due course. But this view was rejected in *Autry, supra,* at 2, and *Maggio, supra,* at 48.

Accordingly, the application to vacate the stay of execution is granted.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Because there is no support in the record for the conclusion that the Court of Appeals abused its discretion when it granted a stay of execution to enable respondent Tuggle to file a petition for certiorari, I respectfully dissent. The fact that the respondent has substantial grounds for challenging the constitutionality of his death sentence is demonstrated both by the issuance of a writ of habeas corpus by the District Court and by the 19-page opinion filed by the Court of Appeals. *Tuggle* v. *Thompson*, 57 F. 3d 1356 (CA4 1995). Promptly after that opinion was announced, respondent filed a motion for a stay of execution supported by an explanation of why "the three-part inquiry," *ante* this page, described in *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896 (1983), warranted that relief. It is disrespectful to the Court of Appeals to assume that its grant of that motion did not implicitly endorse the reasoning in respondent's moving papers.

The stay of execution would merely have given respondent the opportunity to seek the review in this Court that has been authorized by Congress and our Rules. In my opinion it is both unwise and unfair to require a death row inmate who has acted diligently at all stages of his litigation to prepare and file a petition raising substantial claims more promptly than other litigants. I would deny the warden's application.

JUSTICE SOUTER would deny the application to vacate stay of execution.

JUSTICE BREYER, for reasons stated in the first paragraph of JUSTICE STEVENS' dissent, votes to deny the application.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 953 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MAY 30 THROUGH SEPTEMBER 29, 1995

MAY 30, 1995

Dismissal Under Rule 46

No. 94–1139. GOVERNMENT EMPLOYEES INSURANCE CO. ET AL. *v.* DUANE. C. A. 4th Cir. [Certiorari granted, 513 U. S. 1189.] Writ of certiorari dismissed under this Court's Rule 46.1.

Miscellaneous Orders

No. — — —. CONNER *v.* NORFOLK SOUTHERN CORP. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — —. GOETZ ET AL. *v.* CROSSON ET AL.; and
No. — — —. LONCHAR *v.* THOMAS, WARDEN. Motions for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners denied.

No. D–1537. IN RE DISBARMENT OF WAGNER. Disbarment entered. [For earlier order herein, see 514 U. S. 1061.]

No. 94–1244. BEHRENS *v.* PELLETIER. C. A. 9th Cir. [Certiorari granted, 514 U. S. 1035.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Samuel T. Rees, Esq., of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 94–8631. IN RE JUDD. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 20, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 94–1745. IN RE MANDANICI; and
No. 94–8700. IN RE VERDONE. Petitions for writs of mandamus denied.

No. 94–8706. IN RE SNYDER. Petition for writ of prohibition denied.

Certiorari Granted

No. 94–1785. COMMISSIONER OF INTERNAL REVENUE *v.* LUNDY. C. A. 4th Cir. Certiorari granted. Reported below: 45 F. 3d 856.

Certiorari Denied

No. 93–9026. STEVENS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 181 Wis. 2d 410, 511 N. W. 2d 591.

No. 93–9237. KERR *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 181 Wis. 2d 372, 511 N. W. 2d 586.

No. 94–78. MICHIGAN *v.* ASHER. Ct. App. Mich. Certiorari denied. Reported below: 203 Mich. App. 621, 513 N. W. 2d 144.

No. 94–1317. SUGRUE *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 26 F. 3d 8.

No. 94–1320. VAIL ET AL. *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 208.

No. 94–1334. ALEX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 32 F. 3d 1203.

No. 94–1412. FUENTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 565.

No. 94–1540. CHEEVES ET AL. *v.* SOUTHERN CLAYS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 326.

No. 94–1567. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION *v.* YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 481 and 43 F. 3d 1284.

No. 94–1625. HERRON *v.* TENNESSEE BOARD OF REGENTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1388.

No. 94–1626. JONES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 662 So. 2d 299.

No. 94–1627. Society of Financial Examiners *v.* National Association of Certified Fraud Examiners et al. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 223.

No. 94–1630. National Amusements, Inc. *v.* Town of Dedham. C. A. 1st Cir. Certiorari denied. Reported below: 43 F. 3d 731.

No. 94–1632. Cades *v.* H & R Block, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 869.

No. 94–1636. Boyajian et al. *v.* Olfacto-Labs et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 94–1638. Ho *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied.

No. 94–1640. Sherwin-Williams Co. *v.* Eastern Mountain Platform Tennis, Inc. C. A. 1st Cir. Certiorari denied. Reported below: 40 F. 3d 492.

No. 94–1655. Miller *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied.

No. 94–1656. Farmers Insurance Co., Inc. *v.* Jabbour. Sup. Ct. Okla. Certiorari denied.

No. 94–1657. Hogue et al. *v.* United Olympic Life Insurance Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 39 F. 3d 98.

No. 94–1658. Amcast Industrial Corp. et al. *v.* Detrex Corp. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 155.

No. 94–1661. Ashland Inc. *v.* Kentucky Revenue Cabinet. Ct. App. Ky. Certiorari denied. Reported below: 888 S. W. 2d 701.

No. 94–1662. Musslewhite *v.* State Bar of Texas. C. A. 5th Cir. Certiorari denied. Reported below: 32 F. 3d 942.

No. 94–1663. Berryman et ux. *v.* Credit Adjusters. Ct. App. Minn. Certiorari denied.

No. 94–1670. Hendry Corp. et al. *v.* National Council on Compensation Insurance. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–1671. SCALES *v.* GEORGE WASHINGTON UNIVERSITY. C. A. D. C. Cir. Certiorari denied. Reported below: 44 F. 3d 1031.

No. 94–1672. SHUMATE *v.* NCNB CORP. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–1680. WILSON *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1075.

No. 94–1698. SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. *v.* HEATON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 43 F. 3d 1176.

No. 94–1699. ALADDIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ALADDIN, DECEASED, ET AL. *v.* GRUMMAN AMERICAN AVIATION CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1115.

No. 94–1708. NLFC, INC. *v.* DEVCOM MID-AMERICA, INC. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 231.

No. 94–1710. ELLIS *v.* SENNHOLZ. Ct. App. Okla. Certiorari denied.

No. 94–1713. HARPER *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 94–1727. CALHOUN *v.* ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 668.

No. 94–1730. LOSSON ET VIR *v.* LOSSON. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1144.

No. 94–1733. TURNER, AKA FOUTZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 44 F. 3d 900.

No. 94–1746. DEBLASE ET AL. *v.* CIGNA INDIVIDUAL FINANCIAL SERVICES CO. ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–1754. REEVES *v.* ACROMED CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 300.

No. 94–1773. SHERMAN *v.* BERLIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1506.

No. 94–1788. Burns *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–1793. Smith *v.* Colorado. Ct. App. Colo. Certiorari denied. Reported below: 888 P. 2d 305.

No. 94–1803. United Food & Commercial Workers International Union, AFL–CIO, et al. *v.* John Morrell & Co. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 1302.

No. 94–1810. Nemelka *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1020.

No. 94–7580. Bahm *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 33 F. 3d 62.

No. 94–7789. DeBardeleben *v.* Quinlan et al. C. A. 3d Cir. Certiorari denied.

No. 94–8009. Buell *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 1211, 639 N. E. 2d 110.

No. 94–8265. Hern *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 892 S. W. 2d 894.

No. 94–8273. Hudspeth *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1015.

No. 94–8279. Ramos *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–8379. Martin *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 645 So. 2d 190.

No. 94–8511. Banda *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 890 S. W. 2d 42.

No. 94–8690. Scott *v.* Calderon, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1188.

No. 94–8692. Phelps *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 644 N. E. 2d 953.

No. 94–8693. Bilyeu *v.* Rather et al. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 536.

No. 94–8698. McDonald *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 94–8705. Douglass *v.* Estate of Douglass. Sup. Ct. Tex. Certiorari denied.

No. 94–8709. Gilliam *v.* County of Los Angeles et al. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1505.

No. 94–8712. Martin *v.* Peters et al. C. A. 9th Cir. Certiorari denied.

No. 94–8714. Meriwether *v.* Whitley, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 664.

No. 94–8720. Sullivan *v.* Love, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 94–8723. Stewart *v.* Murphy et al. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 641.

No. 94–8725. Brannon *v.* LaMaina; and Hinte *v.* Shupe. Sup. Ct. Del. Certiorari denied. Reported below: 659 A. 2d 227 (first case); 651 A. 2d 788 (second case).

No. 94–8733. Vinson *v.* Groose, Superintendent, Jefferson City Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 54 F. 3d 781.

No. 94–8734. Watson *v.* Monroe, Warden. C. A. 6th Cir. Certiorari denied.

No. 94–8738. Kirkpatrick *v.* Candee, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 426.

No. 94–8740. Thomas, aka Thompson *v.* Artuz, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 94–8742. Abdul-Alim *v.* New Jersey et al. C. A. 3d Cir. Certiorari denied. Reported below: 30 F. 3d 1484.

No. 94–8747. Pate *v.* Hargett, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 670.

No. 94–8749. Hopkins *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–8758. Glover *v.* Mitchell. C. A. 8th Cir. Certiorari denied.

No. 94–8759. Ganey *v.* McDade. C. A. 4th Cir. Certiorari denied. Reported below: 47 F. 3d 1164.

No. 94–8761. Sheng *v.* Nintendo of America, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 1007.

No. 94–8775. Wallace, aka Cole *v.* Wallace. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 263 Ill. App. 3d 1130, 683 N. E. 2d 552.

No. 94–8789. Burdine *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 901 S. W. 2d 456.

No. 94–8799. Carter *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 569, 451 S. E. 2d 157.

No. 94–8823. Carpino *v.* Demosthenes et al. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1504.

No. 94–8905. Markham *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 94–8957. Fry *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8966. Saldana *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 427.

No. 94–8981. McFarland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1508.

No. 94–8982. Jimenez *v.* Lewis, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 436.

No. 94–9011. Hernandez *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–9013. Carrier *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 46 F. 3d 1132.

No. 94–9014. York *v.* United States; and
No. 94–9045. York *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 425.

No. 94–9018. McNeil *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1128.

No. 94–9019. Lee *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 323.

No. 94–9020. Cochran *v.* Department of Veterans Affairs et al. C. A. 4th Cir. Certiorari denied. Reported below: 50 F. 3d 5.

No. 94–9021. Baker *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 432.

No. 94–9023. Graves *v.* United States; and
No. 94–9046. Carlos Torres *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 1423.

No. 94–9025. Reece *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 426.

No. 94–9026. Starley *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1148.

No. 94–9032. Chapman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1189.

No. 94–9033. Shorter *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 36 F. 3d 127.

No. 94–9034. Randle *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 221.

No. 94–9035. Gamboa Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 117.

No. 94–9037. Colon *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1134.

No. 94–9039. Crosby *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9040. Branscomb *v.* Norris, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 47 F. 3d 258.

No. 94–9041. Monson, aka Barr *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 48 F. 3d 1217.

No. 94–9050. Frushon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–9051. Hundley *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1463.

No. 94–9054. Scott *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 431.

No. 94–9056. Poplawski *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 46 F. 3d 42.

No. 94–9058. Ortiz-Reynel *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–9062. Nichols *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 46 F. 3d 1137.

No. 94–9064. Jordan *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 49 F. 3d 732.

No. 94–9069. Pierson *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 3d 1396.

No. 94–9070. Nelson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–9072. Ingraham *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1171.

No. 94–9077. Burdette *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9079. Elizondo Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 426.

No. 94–9082. Tearl *v.* Smith, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 48 F. 3d 1217.

No. 94–9084. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1349.

No. 94–9094. WHEELER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 1167.

No. 94–9099. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 531.

No. 94–9101. HENRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 17.

No. 94–9102. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 50 F. 3d 11.

No. 94–9103. FAIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 94–9104. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 251.

No. 94–9105. HUNTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1162.

No. 94–9106. HERRERA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1158.

No. 94–9111. OLIVERAS-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1148.

No. 94–9119. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–9120. GALLARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 424.

No. 94–9123. GARDNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 49 F. 3d 362.

No. 94–1450. LAWSON ET AL. *v.* MURRAY ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 138 N. J. 206, 649 A. 2d 1253.

JUSTICE SCALIA, concurring.

Last Term's decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994), has damaged the First Amendment more quickly and more severely than I feared. In this case the New Jersey courts asserted the power to enjoin residential picketing by antiabortion demonstrators that was explicitly found to have been peaceful and in violation of no state statute or rule of common law. It is one thing for the courts to enforce by injunction a general, content-neutral state law (civil or criminal) against all residential picketing, or to enjoin particular individuals from continuing residential picketing that they have conducted in an unlawful manner (*e. g.*, with the accompaniment of violence). It is quite another thing for the courts to enjoin particular individuals from conducting lawful residential picketing that they have conducted in a lawful manner in the past. That is an unconstitutional prior restraint.

Respondents are Elrick Murray, an obstetrician-gynecologist who performs abortions, and his wife. The two petitioners planned a demonstration at respondents' residence on Sunday, January 20, 1991. On the appointed day, they and 56 other picketers met two policemen near respondents' house; received instruction from the policemen in basic picketing protocol; and were escorted to the sidewalk running in front of respondents' house and 10 neighboring houses. The protesters, carrying signs, walked in a single-file loop on the sidewalk past respondents' house; the picketing lasted about an hour, and "[n]o instances of trespass, violence or disorderly conduct were reported." App. to Pet. for Cert. 90a (App.).

In February 1991, respondents filed suit against petitioners and others in state court, seeking damages and injunctive relief for various common-law torts: invasion of privacy (including interference with the use and enjoyment of respondents' residence), intentional infliction of emotional distress, interference with contractual relations, and others. The Chancery Division of the trial court entered a temporary restraining order. After a hearing on the merits, the trial court denied respondents damages on the ground that *respondents had not made out any of their tort claims.* See *id.*, at 92a–97a. The court then went on to make the following rulings, which converted the proceeding from a tort suit for damages and injunctive relief into a proceeding for imposition of a judicial prior restraint:

> "In addition to these claims, this court must also consider equitable principles when determining the appropriateness of injunctive relief.
>
> "Plaintiffs have a privacy interest *irrespective of their potential tort claim.* . . .

> "It can operate to limit First Amendment rights, *even where the intrusion is not tresspatory* [sic] *or otherwise obstructed.*
>
> "The Court of equity has the inherent authority to balance that interest against First Amendment rights.
>
> "In other words, *this court does not accept defendants' position that no injunction can issue unless a crime or an expressed tort has been committed.*" *Id.*, at 97a (emphases added; citations omitted).

The court then "balanced" the equities and, on the strength of *Frisby* v. *Schultz,* 487 U. S. 474 (1988), found that respondents' interests in residential privacy justified an injunction restraining "defendants and all persons in active concert or participation with them . . . from picketing in any form . . . within 300 feet" of respondents' home. App. 106a.

The Appellate Division and the New Jersey Supreme Court affirmed. When petitioners sought certiorari we granted their petition, vacated the judgment, and remanded for reconsideration in light of our decision in *Madsen.* See *Lawson* v. *Murray,* 513 U. S. 802 (1994). On remand, the New Jersey Supreme Court affirmed the trial court's injunction in part and modified it in part. The court acknowledged (as it had stated even more clearly in its first opinion) that the injunction was "not imposed to remedy unlawful conduct," 138 N. J. 206, 225, 649 A. 2d 1253, 1263 (1994), but rejected petitioners' claim that the injunction therefore constituted an invalid prior restraint. In the alternative, the court relied on an asserted "captive audience" exception to the prior restraint doctrine. See *id.*, at 226, 649 A. 2d, at 1263.

Although I dissented in *Madsen,* I do not believe that the opinion for the Court in that case "approve[d] issuance of an injunction against speech . . . *even when there has been found no violation, or threatened violation, of a law.*" 512 U. S., at 804 (SCALIA, J., dissenting) (emphasis in original). To the contrary, the Court did obeisance to the venerable principle that "[i]njunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree," *id.*, at 764 (citing *United States* v. *W. T. Grant Co.,* 345 U. S. 629 (1953)), no matter how little that principle was honored in application. See also 512 U. S., at 765 ("[I]njunctions . . . afford more precise relief than a statute where a violation of the law has already occurred"); *id.*, at 765, n. 3

("Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a cognizable danger of recurrent violation") (internal quotation marks omitted).

The Federal Constitution does not, of course, directly require that an injunction issue only in such circumstances. But where injunctions *that prohibit speech* are concerned, the Free Speech and Free Press Clauses of the First Amendment impose that requirement indirectly. All speech-restricting injunctions are prior restraints in the literal sense of "'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander* v. *United States*, 509 U. S. 544, 550 (1993) (emphasis deleted). Precedent shows that a speech-restricting "injunction" that is not issued as a *remedy* for an adjudicated or impending violation of law is also a prior restraint in the condemnatory sense, that is, a prior restraint of the sort prohibited by the First Amendment.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), the state courts enjoined the petitioner from distributing literature or picketing anywhere within the city limits, on the same ground that the New Jersey courts expressed here: "[T]he public policy of the [State] strongly favored protection of the privacy of home and family" from the speech activities. Cf. 138 N. J., at 224, 649 A. 2d, at 1263 ("[T]he injunction was entered pursuant to the [trial] court's authority to grant equitable relief to enforce a valid public policy of this State" protecting residential privacy). We held the injunction to be an unconstitutional prior restraint, reasoning that "the injunction operates, *not to redress alleged private wrongs*, but to suppress [speech] on the basis of previous publications." 402 U. S., at 418–419 (emphasis added). *Keefe* relied on *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), the foundation case in this area, where we struck down a state-court order that enjoined a newspaper from publishing malicious, scandalous, or defamatory material. We found the order to be an unconstitutional prior restraint, observing that the statute that authorized the order "is not aimed at the redress of individual or private wrongs," *id.*, at 709, and that "the object of the statute is not punishment, . . . but suppression," *id.*, at 711. See also *id.*, at 715; *Hirsh* v. *Atlanta*, 495 U. S. 927 (1990) (STEVENS, J., concurring in denial of stay) (distinguishing injunctive relief against "a class of persons who have persistently and repeatedly engaged in unlawful conduct" from "a naked prior restraint against . . . a group that did not have a similar history of illegal conduct").

The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law. Once such a basis has been found, later speech may be quashed, or not quashed, in the discretion of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction; the injunction is enforceable through civil contempt, a summary process without the constitutional protection of a jury trial; and the only defense available to the enjoined party is factual compliance with the injunction, *not* unconstitutionality, see *In re Felmeister*, 95 N. J. 431, 445, 471 A. 2d 775, 782 (1984); *In re Carton*, 48 N. J. 9, 16, 222 A. 2d 92, 96 (1966). But the threat to the First Amendment becomes positively alarming when violation of the law is not even a necessary prelude to this expansive discretion—when the defendant's prior speech (and proposed future speech) has been expressly found *not* to constitute a crime or common-law tort, and the only basis for the injunction is a nebulous "public policy" of the State enforced by an inherent equitable power. See 138 N. J., at 225, 649 A. 2d, at 1263. This is *by definition* a policy of enjoining in advance speech that the State does not punish after the fact—that is to say, a policy narrowly tailored to nothing but the suppression of lawful speech. And even that damning assessment assumes, of course, that such a "public policy" even exists in state law, which is highly questionable here. The New Jersey courts have given equitable relief against residential picketing not violative of state law only in this case and another recent case involving abortion protesters. See *Boffard* v. *Barnes*, 136 N. J. 32, 642 A. 2d 338 (1994).* The temptation in cases involving issues of

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*In *K-T Marine, Inc.* v. *Dockbuilders Local Union 1456*, 251 N. J. Super. 107, 597 A. 2d 540 (1991), the Appellate Division affirmed an injunction against residential picketing by a union. There, however, the injunction issued because the trial judge found that "tortious activity . . . had taken place and would continue unless the court interceded." *Id.*, at 110, 597 A. 2d, at 542.

social controversy—precisely the cases where the First Amendment's protections are most needed—will always be for judges to discern a "policy" against whatever-speech-looks-bad-at-the-moment.

Even our *Madsen* decision was, as I read it, unwilling to invite such consequences by cutting prior-restraint doctrine loose from the requirement that injunctions be remedial. The prior-restraint argument advanced by petitioners in that case was summarily rejected in a footnote with the observation that

> "[n]ot all injunctions that may incidentally affect expression . . . are 'prior restraints' . . . . Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . zone [covered by the injunction]. Moreover, the injunction was issued not because of the content of petitioners' expression, . . . *but because of their prior unlawful conduct.*" *Madsen,* 512 U. S., at 764, n. 2 (emphasis added).

The New Jersey Supreme Court read this footnote to mean that even an injunction *not* imposed to remedy or prevent unlawful conduct may nonetheless be valid, depending on an assessment of "factors" such as content neutrality and availability of alternative channels of communication. See 138 N. J., at 221–226, 649 A. 2d, at 1261–1263. But such factors determine the validity of *subsequent* restraints, see, *e. g., Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105, 116 (1991); *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989), and to make them conclusive of the validity of prior restraints as well would destroy the doctrine that prior restraints are specially disfavored, see *Patterson* v. *Colorado ex rel. Attorney General of Colo.,* 205 U. S. 454, 462 (1907) (Holmes, J.); *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 598 (1976) (Brennan, J., concurring in judgment). The presence of such validating factors is a necessary *and sufficient* condition for the constitutionality of a subsequent punishment, but merely a necessary condition for the constitutionality of a prior restraint, which requires *in addition* that it be remedial. It is improper to attribute a different meaning to the ambiguous *Madsen* footnote, which after all appeared in an opinion that elsewhere purported to honor the requirement that speech-restricting injunctions be remedial.

The principal ground for the decision below, then, does not apply *Madsen* but expands it, and contracts the First Amendment *pari passu.* I think it of vital importance that *Madsen* quickly be limited to what it said, rather than what it did. I nonetheless do not vote to grant certiorari here, for two reasons: The alternative ground for the court's decision (existence of a "captive audience" exception to the doctrine of prior restraint), while a highly questionable basis for a discretionary injunction power, presents no clear conflict with the decisions of other courts and could prevent us from reaching the *Madsen* issue. And clarification of *Madsen* is in any event unlikely to occur in another case involving the currently disfavored class of antiabortion protesters. Accordingly, I concur in the denial of certiorari.

No. 94–1498. ILLINOIS *v.* SALAZAR. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 162 Ill. 2d 513, 643 N. E. 2d 698.

No. 94–1652. CHAMBERS ET AL. *v.* PELFREY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 43 F. 3d 1034.

No. 94–1532. PARKING ASSOCIATION OF GEORGIA, INC., ET AL. *v.* CITY OF ATLANTA, GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 764, 450 S. E. 2d 200.

JUSTICE THOMAS, with whom JUSTICE O'CONNOR joins, dissenting.

Motivated by a desire to improve the attractiveness of its downtown region, the Atlanta City Council passed an ordinance requiring certain existing surface parking lots to include landscaped areas equal to at least 10% of the paved area and to have at least one tree for every eight parking spaces. The ordinance covers some 350 parking lots; petitioners estimate that compliance with the landscaping requirements will cost approximately $12,500 per lot, for a total of $4,375,000. Additionally, parking lot owners will lose revenue due to lost parking spaces and lost advertising dollars: The trees allegedly will obscure existing advertising signs and cause petitioners to lose contracts worth about $1,636,000.

Petitioners sought injunctive and declaratory relief on the ground that the Atlanta ordinance was an uncompensated taking of property in violation of the Fifth Amendment. The state trial court ruled in favor of the city. In a divided opinion, the Supreme Court of Georgia affirmed. 264 Ga. 764, 450 S. E. 2d 200 (1994). The court held that the ordinance was neither a physical nor a regulatory taking. The court relied on *Agins* v. *City of Tiburon,* 447 U. S. 255 (1980), to conclude that the ordinance was constitutional because it "advances legitimate governmental interests and leaves the plaintiffs with an economically viable use in their property." 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3. The court distinguished *Dolan* v. *City of Tigard,* 512 U. S. 374 (1994), which requires a showing of rough proportionality between the conditions imposed and the impact of the owner's development, on the ground that although the city of Tigard had not made an "'individualized determination that the required dedication is related both in nature and extent to the impact of the development,'" 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3 (quoting *Dolan, supra,* at 391), the city of Atlanta had made a "legislative determination" with regard to many landowners, 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3, thus placing this case outside the reach of *Dolan.*

The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature. In addition to the court below, at least one other court has relied upon the "legislative" character of state action to conclude that *Dolan* was inapposite and that the less stringent *Agins* standard should be applied. See *Harris* v. *Wichita,* 862 F. Supp. 287, 294 (D. Kan. 1994). Other courts, however, have applied *Dolan* to cases involving alleged legislative regulatory takings. In *Trimen Development Co.* v. *King Cty.,* 124 Wash. 2d 261, 877 P. 2d 187 (1994), the Washington Supreme Court applied *Dolan* to an ordinance similar to the one at issue here. A King County Council ordinance required that developers seeking to build housing either dedicate land for public parks or pay a fee. Despite the fact that the ordinance was clearly a "legislative enactment," the court applied *Dolan*'s rough proportionality test. 124 Wash. 2d, at 274, 877 P. 2d, at 194. See also *Manocherian* v. *Lennox Hill Hospital,* 84 N. Y. 2d 385, 393, 643 N. E. 2d 479, 483 (1994), cert. denied, 514 U. S. 1109 (1995) (applying *Dolan* to alleged legislative taking).

It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Although *Dolan* purports to be an exception to *Agins*, the logic of these two cases appears to point in different directions. The lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict. See *Dolan, supra,* at 383 (observing that certiorari was granted because the Oregon Supreme Court allegedly had misapplied *Nollan* v. *California Coastal Comm'n,* 483 U. S. 825 (1987)). Where, as here, there is a conflict, the reasons for granting certiorari are all the more compelling.

Because the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts, I would grant certiorari.

No. 94–1629. TABAS ET AL. *v.* TABAS ET AL. C. A. 3d Cir. Motion of American Institute of Certified Public Accountants for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 47 F. 3d 1280.

No. 94–1649. ELLMAN *v.* DAVIS, WARDEN. C. A. 2d Cir. Motion of the parties to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 42 F. 3d 144.

No. 94–1743. MALLARD BAY DRILLING, INC., ET AL. *v.* WATTERSON. Ct. App. La., 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 649 So. 2d 431.

No. 94–9443 (A–908). MANN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 94–1240. Whittlesey *v.* Office of Hearings and Appeals, Social Security Administration, 514 U. S. 1063;

No. 94–1376. Ilic *v.* Liquid Air Corp., 514 U. S. 1064;

No. 94–1459. Duenas *v.* Shalala, Secretary of Health and Human Services, 514 U. S. 1051;

No. 94–7436. McCright *v.* Borg, Warden, 514 U. S. 1020;

No. 94–7959. Okoro *v.* United States, 514 U. S. 1027;

No. 94–8006. Mason *v.* Superior Court of California, Los Angeles County, 514 U. S. 1053;

No. 94–8097. Young *v.* Nuclear Regulatory Commission et al., 514 U. S. 1068;

No. 94–8137. In re Hollingsworth, 514 U. S. 1062;

No. 94–8140. Amaral *v.* Rhode Island Hospital Trust et al., 514 U. S. 1055;

No. 94–8160. Lewis *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division, 514 U. S. 1069;

No. 94–8186. Azubuko *v.* Chief Adult Probation Officer et al., 514 U. S. 1070;

No. 94–8376. Early *v.* United States, 514 U. S. 1075;

No. 94–8425. Glant *v.* Florida Bar, 514 U. S. 1086; and

No. 94–8568. Chapman *v.* Abrahamson, Warden, 514 U. S. 1077. Petitions for rehearing denied.

June 5, 1995

Certiorari Granted—Vacated and Remanded

No. 94–1398. United Mine Workers of America, AFL–CIO *v.* Peabody Coal Co. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *North Star Steel Co.* v. *Thomas, ante,* p. 29. Reported below: 38 F. 3d 850.

Miscellaneous Orders

No. — — —. Herrera *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division; and

No. — — —. Gonzales *v.* United States. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. — — —. Clinton *v.* North Carolina. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. D–1488. In re Disbarment of Jones. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1549. In re Disbarment of Jan. It is ordered that Joseph M. Jan, of Toledo, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1550. In re Disbarment of Diuguid. It is ordered that John P. Diuguid, of Bethesda, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1551. In re Disbarment of Weeks. It is ordered that Timothy Weeks, of Newark, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1552. In re Disbarment of Cacioppo. It is ordered that Richard K. Cacioppo, of Woodland Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1553. In re Disbarment of Brown. It is ordered that Michael A. Brown, of Newton, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1554. In re Disbarment of Offner. It is ordered that Lawrence J. Offner, Jr., of Union, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 94–9205. In re Vey. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8.

Petitioner is allowed until June 26, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Certiorari Granted

No. 94–1660. AMERICAN AIRLINES, INC. *v.* LOCKWOOD. C. A. Fed. Cir. Motion of American Intellectual Property Law Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 50 F. 3d 966.

No. 94–8729. BENNIS *v.* MICHIGAN. Sup. Ct. Mich. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 447 Mich. 719, 527 N. W. 2d 483.

Certiorari Denied

No. 94–1457. DECELL & ASSOCIATES, INC. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 464.

No. 94–1509. SMOLLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 65.

No. 94–1519. DAVID LIPSCOMB UNIVERSITY *v.* STEELE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–1628. GOULD *v.* SMITH, TRUSTEE OF MIAMI CENTER LIQUIDATING TRUST, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–1651. SIMMONS *v.* HINSON, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1213.

No. 94–1675. CITY OF UPPER ARLINGTON ET AL. *v.* VITTITOW ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1100.

No. 94–1676. NORTH CAROLINA *v.* PENDLETON. Sup. Ct. N. C. Certiorari denied. Reported below: 339 N. C. 379, 451 S. E. 2d 274.

No. 94–1677. LEHTINEN ET UX. *v.* HARSTAD. Ct. App. Minn. Certiorari denied.

No. 94–1681. BLUE CROSS & BLUE SHIELD ASSN. *v.* HUBBARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 942.

No. 94–1686. SGS CONTROL SERVICES, INC. *v.* INTERNATIONAL ORE & FERTILIZER CORP. C. A. 2d Cir. Certiorari denied. Reported below: 38 F. 3d 1279.

No. 94–1735. SAVOY *v.* CASCADE COUNTY SHERIFF'S DEPARTMENT ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 268 Mont. 507, 887 P. 2d 160.

No. 94–1748. LUKER *v.* AKRO CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 45 F. 3d 1541.

No. 94–1761. IN RE HUDNALL. Sup. Ct. Ga. Certiorari denied.

No. 94–1776. NORTH ROCKLAND CENTRAL SCHOOL DISTRICT *v.* CONSOLIDATED RAIL CORPORATION;

No. 94–1787. ERIE COUNTY *v.* CONSOLIDATED RAIL CORPORATION; and

No. 94–1789. NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL. *v.* CONSOLIDATED RAIL CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 473.

No. 94–1791. FREDERICKS *v.* WRIGHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1141.

No. 94–1828. LONGFELLOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 43 F. 3d 318.

No. 94–1839. WARSHAY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 50 F. 3d 2.

No. 94–1855. GREEN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 36 Conn. App. 933, 651 A. 2d 292.

No. 94–7872. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–7904. FERO *v.* KERBY. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1462.

No. 94–8104. MORRELL, AS GUARDIAN AD LITEM FOR LONG ET AL. *v.* BRITT, SECRETARY, NORTH CAROLINA DEPARTMENT OF

HUMAN RESOURCES, ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 230, 449 S. E. 2d 175.

No. 94–8222. LOWE *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 873.

No. 94–8232. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–8282. DEAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 246 Neb. 869, 523 N. W. 2d 681.

No. 94–8314. MCCULLOUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 636.

No. 94–8377. CHASE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 645 So. 2d 829.

No. 94–8380. BENNETT *v.* UNITED STATES; and
No. 94–8755. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 44 F. 3d 1364.

No. 94–8388. SEDOR *v.* RUNYON, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 42 F. 3d 741.

No. 94–8659. DAVIS *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 41.

No. 94–8774. HARRIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 9 Cal. 4th 407, 886 P. 2d 1193.

No. 94–8777. SLEDGE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 94–8778. VOHRA *v.* SIKAND ENGINEERING ASSOCIATES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–8779. PINTOR *v.* ORANGE COUNTY, CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–8780. WILLIAMS *v.* RUNYON, POSTMASTER GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 440.

No. 94–8781. MILLER *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 94–8782. Wheat *v.* Caspari, Superintendent, Missouri Eastern Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 94–8786. Adams *v.* Moore, Director, South Carolina Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 175.

No. 94–8791. Jackson *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 636 So. 2d 1217.

No. 94–8793. Scalice *v.* Massey et al. Sup. Ct. Wash. Certiorari denied.

No. 94–8795. Patterson *v.* Mohs, Associate Warden. Ct. App. Minn. Certiorari denied.

No. 94–8800. Thomas *v.* Zimmerman, Superintendent, State Correctional Institution at Waymart, et al. C. A. 3d Cir. Certiorari denied.

No. 94–8802. Swain *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 94–8803. Phillips *v.* Ganjoo et al. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1126.

No. 94–8808. Hicks *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 447 Mich. 819, 528 N. W. 2d 136.

No. 94–8810. Farr *v.* White, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1504.

No. 94–8815. Jensen *v.* Berg et al. C. A. 8th Cir. Certiorari denied. Reported below: 45 F. 3d 433.

No. 94–8820. Lee *v.* Pruett, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 426.

No. 94–8821. Martinez-Sandoval *v.* Kirsch et al. Ct. App. N. M. Certiorari denied. Reported below: 118 N. M. 616, 884 P. 2d 507.

No. 94–8822. Kitchens *v.* Beckham. C. A. 11th Cir. Certiorari denied.

No. 94–8824. Pink *v.* Jones, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 94–8825. Whitsitt *v.* Franchise Tax Board of California. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 638.

No. 94–8828. Thompson *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 648 So. 2d 692.

No. 94–8829. Cancel *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 94–8830. Azubuko *v.* Murdoch et al. C. A. 1st Cir. Certiorari denied. Reported below: 43 F. 3d 1456.

No. 94–8831. Brown *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 645.

No. 94–8833. Marten *v.* Department of Veterans Affairs. C. A. 2d Cir. Certiorari denied.

No. 94–8835. Lathan *v.* Missouri. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 889 S. W. 2d 64.

No. 94–8841. McEaddy et al. *v.* Brooks et al. C. A. 1st Cir. Certiorari denied.

No. 94–8843. Sibay *v.* Crestar Financial Corp. et al. C. A. D. C. Cir. Certiorari denied.

No. 94–8854. Akbar *v.* United States et al. C. A. D. C. Cir. Certiorari denied.

No. 94–8856. Ignacio *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 47 F. 3d 1182.

No. 94–8874. Bartlett *v.* Dragovich et al. C. A. 3d Cir. Certiorari denied.

No. 94–8889. Okpala *v.* United States Customs Service et al. C. A. 11th Cir. Certiorari denied.

No. 94–8906. Keenum *v.* Makel, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1169.

No. 94-8946. SMITH *v.* SOUTH CAROLINA. Ct. Common Pleas of Anderson County, S. C. Certiorari denied.

No. 94-8983. JERMYN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 539 Pa. 371, 652 A. 2d 821.

No. 94-9017. TOBIAS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 884 S. W. 2d 571.

No. 94-9057. BARBARIS *v.* UNITED STATES; and
No. 94-9100. GRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1162.

No. 94-9061. WATSON *v.* MITCHELL, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1458.

No. 94-9117. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 427.

No. 94-9121. RAINERI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 42 F. 3d 36.

No. 94-9124. LEISURE *v.* NUTH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 51 F. 3d 266.

No. 94-9134. CUNNINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94-9135. BLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 33 F. 3d 1454.

No. 94-9139. LOVE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 435 Pa. Super. 555, 646 A. 2d 1233.

No. 94-9140. NUNEZ-CARREON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 F. 3d 995.

No. 94-9144. PERRIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 869.

No. 94-9145. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 427.

No. 94-9149. ROGERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 41 F. 3d 25.

No. 94–9153. FAIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9154. FRIEDMAN *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 46 F. 3d 115.

No. 94–9155. WADE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 45 F. 3d 424.

No. 94–9156. VALENTEEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 F. 3d 771.

No. 94–9161. DOUGLAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1127.

No. 94–9162. GILLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 1440.

No. 94–9163. PENDERGRASS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 47 F. 3d 1166.

No. 94–9164. HERNANDEZ-FUNDORA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 49 F. 3d 848.

No. 94–9168. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–9170. WASHPUN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 52 F. 3d 327.

No. 94–9171. WALSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–9173. SOTO-OLIVAS *v.* UNITED STATES; and FRANCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 F. 3d 788 (first case); 48 F. 3d 1229 (second case).

No. 94–9176. PROFFIT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 49 F. 3d 404.

No. 94–9181. MARTINEZ-CANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 F. 3d 17.

No. 94–9183. VILLOT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–9206. AZIZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1127.

No. 94–9209. MELONCON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–9210. ANTONELLI *v.* GETTY. C. A. 8th Cir. Certiorari denied.

No. 94–9216. HAMMOUDE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 51 F. 3d 288.

No. 94–9218. GILBERT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–9222. SMITH *v.* DRUG ENFORCEMENT AGENCY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 323.

No. 94–9223. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 534.

No. 94–9225. GALLEGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 535.

No. 94–9238. REED *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1152.

No. 94–7810. A. ST. P. C. *v.* B. C. Sup. Ct. La. Motion of American Coalition for Abuse Awareness et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 643 So. 2d 743.

Rehearing Denied

No. 94–1580. COSSETT ET AL. *v.* CLINTON ET AL., 514 U. S. 1097;

No. 94–8045. IN RE SOLIMINE, 514 U. S. 1062;

No. 94–8261. COLEMAN *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 514 U. S. 1072;

No. 94–8702. TSCHUOR *v.* UNITED STATES, 514 U. S. 1092; and

No. 94–8726. IN RE VISINTINE, 514 U. S. 1081. Petitions for rehearing denied.

No. 94–5856. JACOBS *v.* MISSOURI, 513 U. S. 969; and

No. 94–7402. GONZALEZ *v.* OCEAN COUNTY BOARD OF SOCIAL SERVICES ET AL., 513 U. S. 1170. Motions for leave to file petitions for rehearing denied.

JUNE 12, 1995

Certiorari Granted—Vacated and Remanded

No. 94–1518. DOCTOR'S ASSOCIATES, INC., ET AL. *v.* CASAROTTO ET UX. Sup. Ct. Mont. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265 (1995). Reported below: 268 Mont. 369, 886 P. 2d 931.

Miscellaneous Orders

No. ———. SWISHER *v.* TEXAS WORKERS' COMPENSATION COMMISSION ET AL.;
No. ———. MARIAN *v.* SCOTT ET AL.; and
No. ———. ARNETTE *v.* ALLSTATE INSURANCE CO. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–1530. IN RE DISBARMENT OF WINDHEIM. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1533. IN RE DISBARMENT OF SHREVE. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1555. IN RE DISBARMENT OF FEIT. It is ordered that Michael A. Feit, of Albany, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1556. IN RE DISBARMENT OF WARTER. It is ordered that J. Christopher Warter, of South Bend, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1557. IN RE DISBARMENT OF HILGENDORF. It is ordered that George M. Hilgendorf, of Fort Collins, Colo., be suspended from the practice of law in this Court and that a rule

issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $84,531.74 to be paid by the parties equally. [For earlier order herein, see, *e. g.,* 514 U. S. 1125.]

No. 94–1527. BARR LABORATORIES, INC. *v.* BURROUGHS WELLCOME CO.; and

No. 94–1531. NOVOPHARM, INC., ET AL. *v.* BURROUGHS WELLCOME CO. C. A. Fed. Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 94–9395. IN RE MAHN. Petition for writ of habeas corpus denied.

No. 94–9059. IN RE RAITPORT. Petition for writ of mandamus denied.

No. 94–8804. IN RE SATO. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 94–464. NORFOLK SOUTHERN RAILWAY CO. *v.* NORTH CAROLINA RAILROAD CO. Ct. App. N. C. Certiorari denied. Reported below: 112 N. C. App. 762, 437 S. E. 2d 393.

No. 94–1420. VENTRE *v.* JOHNSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1179.

No. 94–1497. O'MALLEY *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. Sup. Ct. Ill. Certiorari denied. Reported below: 163 Ill. 2d 130, 643 N. E. 2d 825.

No. 94–1525. BARNYAK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 432 Pa. Super. 483, 639 A. 2d 40.

No. 94–1544. SANIDAD ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 1449.

No. 94–1616. WICKS *v.* MISSISSIPPI EMPLOYMENT SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 991.

No. 94–1650. AL-KELANI, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR AUDUBON FEDERAL SAVINGS & LOAN ASSN. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 323 and 324.

No. 94–1682. ATTUL *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 958.

No. 94–1683. DELTA AIRLINES, INC. *v.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–1687. LEROY *v.* ILLINOIS RACING BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 3d 711.

No. 94–1688. MAITLAND ET AL. *v.* MITCHELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 44 F. 3d 1431.

No. 94–1693. SOUTHERN CROWN, INC. *v.* BOARD OF ADJUSTMENT OF THE CITY OF DALLAS. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 427.

No. 94–1694. BEAZLEY *v.* GEORGIA STATE BAR. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 71.

No. 94–1704. ZERMAN *v.* GREENE ET AL. Sup. Ct. Cal. Certiorari denied.

No. 94–1707. WILLIAMSON ET AL. *v.* SACRED HEART HOSPITAL OF PENSACOLA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 667.

No. 94–1711. STEIGMAN ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF DROZE *v.* DANESE ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 641 So. 2d 423.

No. 94–1712. ROMERO ET UX. *v.* THOMSON NEWSPAPERS (WISCONSIN), INC., ET AL. Sup. Ct. La. Certiorari denied. Reported below: 648 So. 2d 866.

No. 94–1715. BUSSEY ET AL. *v.* OWENS. Ct. App. D. C. Certiorari denied.

No. 94–1721. TOWN OF SMITHTOWN ET AL. *v.* WALZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 46 F. 3d 162.

No. 94–1732. DUVALL *v.* CITY OF SANTA MONICA. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1399.

No. 94–1753. MANUFACTURAS INTERNACIONALES LTDA ET AL. *v.* MANUFACTURERS HANOVER TRUST BANK CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1159.

No. 94–1771. DANIEL *v.* CITY OF TAMPA, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 546.

No. 94–1779. MICHAEL Q. JONES, INC. *v.* COUNTY OF TUOLUMNE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 94–1797. LIGHT ET AL. *v.* PARKWAY C–2 SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 41 F. 3d 1223.

No. 94–1813. MARSONER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 959.

No. 94–1860. PATTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 774.

No. 94–1873. MANDACINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 45 F. 3d 1177.

No. 94–1875. ROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1507.

No. 94–1878. KRUCKEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 52 F. 3d 318.

No. 94–1883. HOPE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 43 F. 3d 1140.

No. 94–8192. HALEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 33 F. 3d 1434.

No. 94–8194. B. H. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 645 So. 2d 987.

No. 94–8230. MONROE *v.* FLORIDA LEGISLATURE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 641 So. 2d 863.

No. 94–8463. CORREALES-VALENCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8467. Edwards *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 41 F. 3d 154.

No. 94–8481. Burgess *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 777, 450 S. E. 2d 680.

No. 94–8487. Palermo et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 3d 1358.

No. 94–8510. Badeaux *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 245.

No. 94–8516. Greer *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 94–8525. Gutierrez-Romero *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 678.

No. 94–8587. Levi *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 45 F. 3d 453.

No. 94–8675. Blackston *v.* Becker, Judge, United States Court of Appeals for the Third Circuit, et al. C. A. 3d Cir. Certiorari denied.

No. 94–8678. Mejia-Herrera *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8722. Roberts *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 29 F. 3d 1474.

No. 94–8844. Busch *v.* Nix et al. Sup. Ct. Pa. Certiorari denied.

No. 94–8846. Jacobs *v.* Supreme Court of Missouri. Sup. Ct. Mo. Certiorari denied.

No. 94–8847. Jennings *v.* Reynolds, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 439.

No. 94–8848. Reed *v.* Shelby County Government et al. C. A. 6th Cir. Certiorari denied.

No. 94–8852. McGautha *v.* Jackson County, Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 36 F. 3d 53.

No. 94-8858. POOLE *v.* WOOD, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 45 F. 3d 246.

No. 94-8860. ROME *v.* KYLE, CHAIRMAN, TEXAS BOARD OF PARDONS AND PAROLES (FT). C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 640.

No. 94-8863. FAIRCHILD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 51 F. 3d 129.

No. 94-8865. LAIRD *v.* CRAGIN FEDERAL BANK. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1510.

No. 94-8869. EVANS *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1168.

No. 94-8872. ESTRELLA *v.* SANDERS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1493.

No. 94-8873. CHATFIELD *v.* NORTON, ATTORNEY GENERAL OF COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 47 F. 3d 1178.

No. 94-8876. PURSCHE *v.* CITY OF IRVING, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 424.

No. 94-8880. STOKES *v.* FERRELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 529.

No. 94-8883. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 413.

No. 94-8890. SCHMIDT *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied.

No. 94-8891. BAILEY *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 94-8901. COLBY *v.* TOWN OF HENNIKER, NEW HAMPSHIRE. Super. Ct. N. H., Merrimack County. Certiorari denied.

No. 94-8902. JIMENEZ MONTEON *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 436.

No. 94–8904. JONES *v.* ROADWAY EXPRESS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 537.

No. 94–8908. JONES *v.* YOUNG, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 94–8909. MOORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 209 App. Div. 2d 1039, 619 N. Y. S. 2d 999.

No. 94–8910. MCARTHUR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 652 So. 2d 782.

No. 94–8914. ADAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 94–8916. JAVIDI *v.* KAISER PERMANENTE MEDICAL GROUP, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1400.

No. 94–8917. SYLVIS *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–8922. BRECHEEN *v.* REYNOLDS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 41 F. 3d 1343.

No. 94–8927. JONES ET AL. *v.* NORTH WOODLAND HILLS COMMUNITY ASSN. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 94–8928. NWANZE *v.* WOODY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1467.

No. 94–8934. BROWN *v.* PERRIN ET AL. C. A. 6th Cir. Certiorari denied.

No. 94–8938. HAYS *v.* ARENDS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1483.

No. 94–8947. ROSE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 339 N. C. 172, 451 S. E. 2d 211.

No. 94–9002. MARTIN *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1043.

No. 94–9043. ROBINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 339 N. C. 263, 451 S. E. 2d 196.

No. 94–9044. EGGAR ET AL. *v.* CITY OF LIVINGSTON. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 312.

No. 94–9065. FRIEDMAN *v.* BOARD OF BAR EXAMINERS OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 94–9074. KNAPP *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 46 F. 3d 170.

No. 94–9081. SEVEY *v.* ANGELONE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1145.

No. 94–9083. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 164 Ill. 2d 1, 645 N. E. 2d 844.

No. 94–9110. SPARROW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9125. YOUNG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 434 Pa. Super. 726, 643 A. 2d 711.

No. 94–9141. MURRAY *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 34 F. 3d 1367.

No. 94–9151. HORTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–9160. BUTLER *v.* RICHARDS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–9172. WARD *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 42 M. J. 100.

No. 94–9180. KIRKLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 34 F. 3d 1068.

No. 94–9186. THOMAS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 42 M. J. 205.

No. 94–9188. FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 F. 3d 283.

No. 94–9198. GIRALDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 50 F. 3d 2.

No. 94–9200. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 50 F. 3d 8.

No. 94–9203. Wang *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1347.

No. 94–9221. Olivas-Rivera *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 47 F. 3d 1178.

No. 94–9229. Rosa Behety et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 32 F. 3d 503.

No. 94–9237. Ramires *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–9285. Brennan *v.* Florida et al. C. A. 11th Cir. Certiorari denied.

No. 94–1569. Texas *v.* Riley. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 889 S. W. 2d 290.

No. 94–1749. Jones et al. *v.* National Football League et al.; and

No. 94–1750. Dusbabek et al. *v.* National Football League et al. C. A. 8th Cir. Motion of Public Citizen Inc. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 41 F. 3d 402.

No. 94–8270. Peterkin *v.* Pennsylvania. Sup. Ct. Pa. Motion of petitioner for leave to amend the petition for writ of certiorari granted. Certiorari denied. Reported below: 538 Pa. 455, 649 A. 2d 121.

Rehearing Denied

No. 93–9240. Crawford *v.* Zant, Warden, 514 U. S. 1082;

No. 94–1229. Caulfield *v.* Commissioner of Internal Revenue, 514 U. S. 1016;

No. 94–7996. Shows *v.* Dyal et al., 514 U. S. 1053;

No. 94–8144. Stow *v.* Horan et al., 514 U. S. 1069;

No. 94–8251. Garcia *v.* Florida, 514 U. S. 1085;

No. 94–8252. Half-Day *v.* Perot et al., 514 U. S. 1072;

No. 94–8398. In re Rogers, 514 U. S. 1107;

No. 94–8537. Hicks *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division, 514 U. S. 1088;

No. 94–8581. RUSSELL *v.* UNITED STATES, 514 U. S. 1089; and No. 94–8611. ECHAVARRIA-OLARTE *v.* RENO, ATTORNEY GENERAL, 514 U. S. 1090. Petitions for rehearing denied.

No. 94–1475. PRI-HAR *v.* UNITED STATES, 514 U. S. 1052. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

JUNE 14, 1995

Certiorari Denied

No. 94–9508 (A–918). FEARANCE *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution in order to consider the petition for writ of certiorari in the ordinary course of proceedings. See *Clark* v. *Collins*, 502 U. S. 1052 (1992) (STEVENS, J., dissenting). Reported below: 51 F. 3d 1041.

JUNE 15, 1995

Rehearing Denied

No. 94–8569 (A–940). GRIFFIN *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 514 U. S. 1119. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for rehearing denied.

JUNE 19, 1995

Certiorari Granted—Vacated and Remanded

No. 93–676. CARPENTER *v.* UNITED STATES. C. A. Armed Forces. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ryder* v. *United States*, *ante*, p. 177. Reported below: 37 M. J. 291.

No. 93–966. CLARK *v.* UNITED STATES; DANIELSON *v.* UNITED STATES; DORMAN *v.* UNITED STATES; KOVAC *v.* UNITED STATES; PRIVE *v.* UNITED STATES; and TAITANO *v.* UNITED STATES. C. A. Armed Forces. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Ryder* v. *United*

States, ante, p. 177. Reported below: 39 M. J. 28 (first, third, fifth, and sixth cases); 39 M. J. 29 (second and fourth cases).

No. 94–48. KING FISHER MARINE SERVICE, INC. *v.* PEREZ ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gutierrez de Martinez* v. *Lamagno, ante,* p. 417. Reported below: 20 F. 3d 466.

No. 94–434. MISSOURI ET AL. *v.* JENKINS ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Missouri* v. *Jenkins, ante,* p. 70. Reported below: 23 F. 3d 1297.

No. 94–886. JACKSON ET AL. *v.* CULINARY SCHOOL OF WASHINGTON, LTD., ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilton* v. *Seven Falls Co., ante,* p. 277. Reported below: 27 F. 3d 573.

No. 94–944. COMMISSIONER OF INTERNAL REVENUE *v.* SCHMITZ ET AL.; COMMISSIONER OF INTERNAL REVENUE *v.* KELLER ET AL.; and COMMISSIONER OF INTERNAL REVENUE *v.* RICE ET AL. C. A. 9th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Commissioner* v. *Schleier, ante,* p. 323. Reported below: 34 F. 3d 790 (first case); 34 F. 3d 1072 (second case); 35 F. 3d 571 (third case).

No. 94–1045. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* RAMBO ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Metropolitan Stevedore Co.* v. *Rambo, ante,* p. 291. Reported below: 28 F. 3d 86.

Miscellaneous Orders

No. — — —. BESS *v.* CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–1485. IN RE DISBARMENT OF JACOBS. Disbarment entered. [For earlier order herein, see 513 U. S. 1055.]

No. D–1527. IN RE DISBARMENT OF HERKENHOFF. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1529. In re Disbarment of Spivak. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1536. In re Disbarment of Stern. Disbarment entered. [For earlier order herein, see 514 U. S. 1061.]

No. D–1538. In re Disbarment of Maiolo. Disbarment entered. [For earlier order herein, see 514 U. S. 1061.]

No. D–1541. In re Disbarment of Bell. Disbarment entered. [For earlier order herein, see 514 U. S. 1081.]

No. D–1543. In re Disbarment of Young. Disbarment entered. [For earlier order herein, see 514 U. S. 1081.]

No. D–1545. In re Disbarment of Potts. Disbarment entered. [For earlier order herein, see 514 U. S. 1106.]

No. D–1558. In re Disbarment of Rosengarden. It is ordered that Morton Charles Rosengarden, of Deerfield, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1559. In re Disbarment of Crewell. It is ordered that Ted Henry Crewell, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1560. In re Disbarment of Washington. It is ordered that Edward Vincent Washington, Jr., of Montclair, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 94–8951. Wilkinson *v.* Missouri. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 10, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 94–8667. In re Smith. Petition for writ of mandamus denied.

No. 94–8945. IN RE SPYCHALA. Petition for writ of prohibition denied.

Certiorari Granted

No. 94–1592. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 44 F. 3d 437.

No. 94–1809. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* EPSTEIN ET AL. C. A. 9th Cir. Motion of Business Roundtable for leave to file a brief as *amicus curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 50 F. 3d 644.

No. 94–9088. NEAL *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 46 F. 3d 1405.

Certiorari Denied

No. 94–693. HERNANDEZ *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 29 F. 3d 624.

No. 94–999. DOWNEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 33 F. 3d 836.

No. 94–1041. HAWKINS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 30 F. 3d 1077.

No. 94–1339. MALTBY *v.* WINSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 36 F. 3d 548.

No. 94–1407. PENNSYLVANIA *v.* BULL. Sup. Ct. Pa. Certiorari denied. Reported below: 539 Pa. 150, 650 A. 2d 874.

No. 94–1417. WOODALL ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 47 F. 3d 656.

No. 94–1482. CLOUSER ET AL. *v.* GLICKMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1522.

No. 94–1533. Floyd *v.* Collin County Community College District et al. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 384.

No. 94–1541. Bey et al. *v.* Bisbee. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1096.

No. 94–1558. Equal Employment Opportunity Commission *v.* Francis W. Parker School. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1073.

No. 94–1579. Collins, on Behalf of Shufelt *v.* Duggan. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 94–1581. Regions Bank of Louisiana, Successor in Interest of Secor Bank, et al. *v.* Internal Revenue Service. C. A. 11th Cir. Certiorari denied. Reported below: 31 F. 3d 1081.

No. 94–1605. Mitchell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 465.

No. 94–1611. Haitian Refugee Center, Inc., et al. *v.* Christopher, Secretary of State, et al. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 1412.

No. 94–1668. Rahn *v.* Drake Center, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 31 F. 3d 407.

No. 94–1709. Thomas *v.* Baxter. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–1717. Greer et ux. *v.* Landmark Bancshares of Illinois, Inc., et al. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 261 Ill. App. 3d 1131, 682 N. E. 2d 1266.

No. 94–1725. Crane Co. *v.* United States ex rel. Rabushka et al. C. A. 8th Cir. Certiorari denied. Reported below: 40 F. 3d 1509.

No. 94–1729. O'Quinn *v.* Kline. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 874 S. W. 2d 776.

No. 94–1731. Rowland, Governor of Connecticut, et al. *v.* Juan F. et al. C. A. 2d Cir. Certiorari denied. Reported below: 37 F. 3d 874.

No. 94–1736. TODD ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 643 So. 2d 625.

No. 94–1737. K. R. B. *v.* STEPHENSON ET AL. Ct. App. Ga. Certiorari denied. Reported below: 214 Ga. App. XXVI.

No. 94–1739. NATIONAL PAINT & COATINGS ASSN. ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 1124.

No. 94–1742. OSBORNE ET UX. *v.* POWER ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 318 Ark. 858, 890 S. W. 2d 570.

No. 94–1751. WILLIAMS *v.* CAPPS TRAILER SALES ET AL. Ct. Civ. App. Ala. Certiorari denied.

No. 94–1752. GARRETT ET AL. *v.* GILLESS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1168.

No. 94–1755. KOUPAL, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, KOUPAL *v.* SIOUX FALLS SCHOOL DISTRICT. Sup. Ct. S. D. Certiorari denied. Reported below: 526 N. W. 2d 248.

No. 94–1757. KLEENWELL BIOHAZARD WASTE & GENERAL ECOLOGY CONSULTANTS, INC. *v.* NELSON, CHAIRMAN, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 391.

No. 94–1759. ELLINGTON ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–1762. MORETTI *v.* DINICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1117.

No. 94–1765. INN OF MIAMI AIRPORT, INC. *v.* PERREN-VIBES MUSIC, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–1766. MICHIGAN *v.* HENSICK. Ct. App. Mich. Certiorari denied.

No. 94–1767. SULLIVAN ET UX. *v.* CITY OF MEMPHIS. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–1768. CAPITOL INDEMNITY CORP. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 320.

No. 94–1769. MURPHY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 45 F. 3d 520.

No. 94–1774. LESLIE *v.* LONG BEACH PROSECUTOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 F. 3d 280.

No. 94–1775. CAVER *v.* GERACE, ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITIES, ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 644 So. 2d 1161.

No. 94–1777. BALL ET AL. *v.* GASHO ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1420.

No. 94–1781. ATTORNEY R *v.* MISSISSIPPI BAR. Sup. Ct. Miss. Certiorari denied. Reported below: 649 So. 2d 820.

No. 94–1782. WISTON XXIV LIMITED PARTNERSHIP *v.* BALCOR PENSION INVESTORS V. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 441.

No. 94–1783. SCARIANO *v.* JUSTICES OF THE SUPREME COURT OF INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 38 F. 3d 920.

No. 94–1784. AMATO *v.* LOUISIANA COMMISSIONER OF SECURITIES ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 644 So. 2d 412.

No. 94–1792. UNIFIED SCHOOL DISTRICT NO. 244 ET AL. *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 256 Kan. 232, 885 P. 2d 1170.

No. 94–1794. DAVIS, INDIVIDUALLY AND AS NEXT FRIEND OF DAVIS, A MINOR, ET AL. *v.* FICANO, SHERIFF, WAYNE COUNTY, ET AL. Ct. App. Mich. Certiorari denied. Reported below: 201 Mich. App. 572, 507 N. W. 2d 751.

No. 94–1795. YARDARM RESTAURANT, INC. *v.* CITY OF POMPANO BEACH. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 641 So. 2d 1377.

No. 94–1798. HOME OF FAITH, DBA AMBASSADOR MANOR SOUTH, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 263.

No. 94–1805. CITY OF NEW ORLEANS ET AL. *v.* LOUISIANA DEBATING & LITERARY ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 1483.

No. 94–1814. BURNS *v.* REED. C. A. 7th Cir. Certiorari denied. Reported below: 44 F. 3d 524.

No. 94–1834. ALPER ET AL. *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 94–1852. ALLEY *v.* GENERAL ELECTRIC CAPITAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 329.

No. 94–1899. PEREZ-AGUILERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 1552.

No. 94–6703. KIMBRO *v.* VELTEN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 30 F. 3d 1501.

No. 94–7239. HENDERSON *v.* BAIRD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 29 F. 3d 464.

No. 94–7412. MODDON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–8010. BROXTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 888 S. W. 2d 23.

No. 94–8131. LEDBETTER *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 35 F. 3d 1062.

No. 94–8179. GILLESPIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 44 F. 3d 1364.

No. 94–8507. OUTTEN *v.* DELAWARE; and
No. 94–8512. SHELTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 650 A. 2d 1291.

No. 94–8566. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 170.

No. 94–8853. QUESINBERRY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 94–8888. SCOTT *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 1547.

No. 94–8935. Carrillo et al. *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 164 Ill. 2d 144, 646 N. E. 2d 582.

No. 94–8939. Jerome *v.* Bidders Inc., dba Satellite Motel. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–8941. Alexander *v.* Johnson et al. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 386.

No. 94–8948. Oriakhi *v.* West et al. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1126.

No. 94–8953. Woodall *v.* Hill, Sheriff, Sedgwick County, Kansas, et al. C. A. 10th Cir. Certiorari denied. Reported below: 44 F. 3d 904.

No. 94–8954. Vohra *v.* California Workers' Compensation Appeals Board et al. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–8958. Schwarz *v.* Interpol et al. C. A. 10th Cir. Certiorari denied. Reported below: 48 F. 3d 1232.

No. 94–8959. Schwarz *v.* Church of Scientology International et al. C. A. 10th Cir. Certiorari denied. Reported below: 48 F. 3d 1232.

No. 94–8962. Stuart *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 94–8964. Page *v.* Angelone, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1467.

No. 94–8968. Weinstein *v.* Weinstein. Sup. Ct. N. J. Certiorari denied.

No. 94–8970. Calhoun *v.* Washington. Ct. App. Wash. Certiorari denied.

No. 94–8971. Homo *v.* Town of Henniker. Sup. Ct. N. H. Certiorari denied.

No. 94–8973. Thinh Van Cao *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 419 Mass. 383, 644 N. E. 2d 1294.

No. 94–8975. Pietri *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 1347.

No. 94–8978. Wood *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 180 Ariz. 53, 881 P. 2d 1158.

No. 94–8986. Rogers *v.* Cuyson et al. C. A. 7th Cir. Certiorari denied.

No. 94–8987. Smith *v.* Carroll et al. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 94–8991. Mincey *v.* Thomas, Warden. Sup. Ct. Ga. Certiorari denied.

No. 94–8992. Jones *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 648 So. 2d 669.

No. 94–8993. Noel *v.* White et al. C. A. 9th Cir. Certiorari denied.

No. 94–8994. Melinie *v.* Cain, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–8995. Brewer *v.* Voinovich, Governor of Ohio, et al. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1167.

No. 94–8998. Viges *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 94–8999. Brigaerts *v.* Gomez, Director, California Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 94–9003. Wilson *v.* Circuit Court of Alabama, Jefferson County. Sup. Ct. Ala. Certiorari denied.

No. 94–9016. McDonald *v.* Luchirini et al. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1142.

No. 94–9024. Germany *v.* Zavaras, Executive Director, Colorado Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 25 F. 3d 1056.

No. 94–9027. De la Rosa *v.* Scully, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1158.

No. 94–9028. Herbst *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 902.

No. 94–9029. Clark *v.* O'Sullivan, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 94–9030. Arnold *v.* Boatmen's Trust Co. C. A. 8th Cir. Certiorari denied.

No. 94–9031. Bethea *v.* Abramajtys, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1506.

No. 94–9049. Fontan *v.* Ieyoub, Attorney General of Louisiana. C. A. 5th Cir. Certiorari denied.

No. 94–9052. Fottler *v.* Ainsworth et al. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1482.

No. 94–9053. Haburn et al. *v.* United States District Court for the Eastern District of North Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1124.

No. 94–9063. Morgan *v.* MacDonald et al. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1291.

No. 94–9075. Spencer *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 425.

No. 94–9113. Henry *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 649 So. 2d 1366.

No. 94–9136. Boyden *v.* Rubin et al. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1138.

No. 94–9147. Romero *v.* Tansy, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1024.

No. 94–9179. Rattler *v.* Office of Personnel Management, Retirement Operations Center. C. A. D. C. Cir. Certiorari denied.

No. 94–9190. Freeman *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 450, 882 P. 2d 249.

No. 94–9192. Green *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 94–9194. Harbin *v.* Maryland Motor Vehicle Administration. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 94–9196. Galvan *v.* Carothers, Superintendent, Lemon Creek Correctional Center, et al. C. A. 9th Cir. Certiorari denied.

No. 94–9202. Burns *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 276.

No. 94–9208. Battie *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–9226. Sargent *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 20.

No. 94–9235. Mark *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1128.

No. 94–9236. Rosario *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 46 F. 3d 1114.

No. 94–9241. Spencer *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–9244. Christie *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–9248. Jamerson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1044.

No. 94–9249. Jones *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9251. Sabini *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 536.

No. 94–9252. Carrera Seguame *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 50 F. 3d 18.

No. 94–9254. ROBINSON *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 50 F. 3d 1033.

No. 94–9256. WEXLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–9259. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 51 F. 3d 274.

No. 94–9260. WILLIAMSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 536.

No. 94–9262. MURPHY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 94–9267. CARROLL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–9268. ARROYO-ANGULO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 52 F. 3d 317.

No. 94–9271. LUCAS *v.* SWINSON, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 94–9273. LOCKETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 656 So. 2d 76.

No. 94–9274. LOCKETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 656 So. 2d 68.

No. 94–9280. MORRIS *v.* UNITED STATES; and
No. 94–9321. MALONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 410.

No. 94–9283. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–9284. CHRISTOPHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 572.

No. 94–9286. GARCIA-RICO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 8.

No. 94–9295. FORD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–9297. Miller *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 47 F. 3d 1166.

No. 94–9308. Washington *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 73.

No. 94–9309. Vasquez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 49 F. 3d 731.

No. 94–9311. Bright *v.* Maryland Division of Correction et al. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1122.

No. 94–9312. Friedman *v.* Board of Registration in Medicine et al. App. Ct. Mass. Certiorari denied. Reported below: 38 Mass. App. 1110, 646 N. E. 2d 437.

No. 94–9316. Reavis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 48 F. 3d 763.

No. 94–9319. Scott et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–9320. McCullough *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 400.

No. 94–9325. Webster *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 48 F. 3d 1225.

No. 94–9326. Daniels *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 51 F. 3d 285.

No. 94–9336. Moreno-Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 1112.

No. 94–9343. Gutierrez *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 48 F. 3d 1134.

No. 94–9345. Nidiffer *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1171.

No. 94–9346. McClinton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 48 F. 3d 1225.

No. 94–9348. Waldemer *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 50 F. 3d 1379.

No. 94–9354. ADDISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1145.

No. 94–9355. AFLLEJE-TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 53 F. 3d 1129.

No. 94–9369. BASDEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 339 N. C. 288, 451 S. E. 2d 238.

No. 94–1612. MICHIGAN *v.* BELLEW. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 447 Mich. 819, 528 N. W. 2d 136.

No. 94–1786. NEW YORK *v.* REYES. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 210 App. Div. 2d 159, 620 N. Y. S. 2d 953.

No. 94–1644. DOE ET AL. *v.* KIRCHNER; and

No. 94–9087. BABY RICHARD, A MINOR, BY HIS GUARDIAN AD LITEM, O'CONNELL *v.* KIRCHNER ET AL. Sup. Ct. Ill. Motions of Yale University Child Study Center et al., Governor of the State of Illinois, and Paul Simon et al. for leave to file briefs as *amici curiae* granted. Motion of Catholic Adoptive Parents Association for leave to file a brief as *amicus curiae* in No. 94–9087 granted. Certiorari denied. Reported below: 164 Ill. 2d 468, 649 N. E. 2d 324.

No. 94–1695. CARRIERE ET AL. *v.* GREY WOLF DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 42 F. 3d 642.

No. 94–1705. BEADLE *v.* CITY OF TAMPA ET AL. C. A. 11th Cir. Motions of National Jewish Commission on Law and Public Affairs et al., General Conference of Seventh-day Adventists et al., Advocates International, Agudath Israel of America, and American Jewish Congress et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 42 F. 3d 633.

No. 94–1719. MOUNTAINWEST FINANCIAL CORP., FKA SCFC ILC INC., DBA MOUNTAINWEST FINANCIAL *v.* VISA U. S. A. INC.

C. A. 10th Cir. Motions of American Council on Consumer Awareness et al., American Financial Services Association, and Center for Public Interest Research et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 36 F. 3d 958.

No. 94–9614 (A–946). FEARANCE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 94–9695 (A–965). FEARANCE *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 56 F. 3d 633.

Rehearing Denied

No. 94–1413. BAKER, LEGALLY INCAPACITATED PERSON BY BAKER, GUARDIAN, ET AL. *v.* SEARS, ROEBUCK & CO., 514 U. S. 1065;
No. 94–8035. DAVIS *v.* FIRST WORTHING MANAGEMENT, 514 U. S. 1054;
No. 94–8242. IN RE CALIFORRNIAA, 514 U. S. 1081;
No. 94–8248. HILI *v.* HILI, 514 U. S. 1114;
No. 94–8277. ETHERIDGE *v.* DEPARTMENT OF THE TREASURY, 514 U. S. 1098;
No. 94–8294. IN RE SNAVELY, 514 U. S. 1106;
No. 94–8299. SOLIS *v.* CIRCLE K CORP. ET AL., 514 U. S. 1098;
No. 94–8375. FRUSHER *v.* BASKIN-ROBBINS ICE CREAM CO. ET AL., 514 U. S. 1114;
No. 94–8402. ROLAND *v.* STALDER ET AL., 514 U. S. 1115;
No. 94–8464. IN RE LITZENBERG, 514 U. S. 1106;
No. 94–8617. IN RE WILSON, 514 U. S. 1081; and
No. 94–8656. MASON ET AL. *v.* UNITED STATES; and MASON *v.* UNITED STATES, 514 U. S. 1100. Petitions for rehearing denied.

JUNE 21, 1995

Certiorari Denied

No. 94–9734 (A–971). GRIFFIN *v.* MISSOURI ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution, pending the District Court's consideration of petitioner's claims for relief under 42 U. S. C. § 1983, for the reasons expressed in the opinions of Chief Judge Richard S. Arnold and Circuit Judge Morris Sheppard Arnold, dissenting from denial of rehearing en banc in the United States Court of Appeals for the Eighth Circuit. Reported below: 66 F. 3d 332.

No. 94-9735 (A-972). GRIFFIN *v.* BOWERSOX, ACTING SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 94-9736 (A-973). GRIFFIN *v.* BOWERSOX, ACTING SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

JUNE 23, 1995

Certiorari Dismissed

No. 94-9773 (A-986). LONCHAR, AS NEXT FRIEND TO LONCHAR *v.* THOMAS, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari dismissed for want of jurisdiction.

JUNE 26, 1995

Certiorari Granted—Vacated and Remanded

No. 94-140. PORAT *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Gaudin, ante,* p. 506. Reported below: 17 F. 3d 660.

No. 94-1268. JOINT SCHOOL DISTRICT NO. 241 ET AL. *v.* HARRIS, ON HER OWN BEHALF AND ON BEHALF OF HER TWO CHILDREN, BUTLER AND HARRIS, ET AL.; and

No. 94–1314. CITIZENS PRESERVING AMERICA'S HERITAGE, INC., ET AL. *v.* HARRIS, ON HER OWN BEHALF AND ON BEHALF OF HER TWO CHILDREN, BUTLER AND HARRIS, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded with directions to dismiss as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 41 F. 3d 447.

Certiorari Dismissed

No. S–1. ANDERSON *v.* KENTUCKY. Ct. App. Ky. [Certiorari granted, 371 U. S. 886.] It appearing that petitioner died April 6, 1994, the writ of certiorari is dismissed as moot.

Miscellaneous Orders

No. — — —. J. M. *v.* ILLINOIS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–1528. IN RE DISBARMENT OF EVANS. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1534. IN RE DISBARMENT OF DOYLE. Disbarment entered. [For earlier order herein, see 514 U. S. 1061.]

No. D–1540. IN RE DISBARMENT OF WHITEHAIR. Disbarment entered. [For earlier order herein, see 514 U. S. 1080.]

No. D–1544. IN RE DISBARMENT OF PRITZKER. Disbarment entered. [For earlier order herein, see 514 U. S. 1081.]

No. D–1561. IN RE DISBARMENT OF FUSILIER. It is ordered that R. Richard Fusilier, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1562. IN RE DISBARMENT OF BARLOW. It is ordered that Dennis Michael Barlow, of Nutley, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1563. IN RE DISBARMENT OF ROBERTSON. It is ordered that Gerald Decatur Robertson, of Reston, Va., be suspended from the practice of law in this Court and that a rule

issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1564. In re Disbarment of Muraski. It is ordered that Anthony Augustus Muraski, of Ann Arbor, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1565. In re Disbarment of Gould. It is ordered that David Francis Gould, of Bangor, Me., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 94–967. Field et al. *v.* Mans. C. A. 1st Cir. [Certiorari granted, 514 U. S. 1095.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that W. E. Whittington IV, Esq., of Norwich, Vt., be appointed to serve as counsel for respondent in this case.

No. 94–1239. Fulton Corp. *v.* Faulkner, Secretary of Revenue of North Carolina. Sup. Ct. N. C. [Certiorari granted, 514 U. S. 1062.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

No. 94–1361. Zicherman, Individually and as Executrix of the Estate of Kole, et al. *v.* Korean Air Lines Co., Ltd.; and

No. 94–1477. Korean Air Lines Co., Ltd. *v.* Zicherman, Individually and as Executrix of the Estate of Kole, et al. C. A. 2d Cir. [Certiorari granted, 514 U. S. 1062.] Motion of Philomena Dooley et al. for leave to file a brief as *amici curiae* granted. Motion of Plaintiffs' Committee in In Re Air Crash Disaster at Lockerbie, Scotland, for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 94–1785. Commissioner of Internal Revenue *v.* Lundy. C. A. 4th Cir. [Certiorari granted, *ante,* p. 1102.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 94–1818. EQUICOR, INC. *v.* LORDMANN ENTERPRISES, INC. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 94–1857. BEYER ET AL. *v.* SIMMONS. C. A. 3d Cir. Motion of respondent Lawrence Simmons to expedite consideration of petition for writ of certiorari denied.

No. 94–9204. IN RE VEY. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 17, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 94–8929. IN RE MUINA; and
No. 94–9193. IN RE HEISZ. Petitions for writs of mandamus denied.

No. 94–9115. IN RE AWOFOLU. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 94–1175. BANK ONE CHICAGO, N. A. *v.* MIDWEST BANK & TRUST CO. C. A. 7th Cir. Certiorari granted. Reported below: 30 F. 3d 64.

No. 94–1893. UNITED STATES ET AL. *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL.; and
No. 94–1900. NATIONAL CABLE TELEVISION ASSN., INC. *v.* BELL ATLANTIC CORP. ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 42 F. 3d 181.

No. 94–8769. RUTLEDGE *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 40 F. 3d 879.

Certiorari Denied

No. 94–158. BATES *v.* WALKER; and MAHONEY *v.* MAYS. C. A. 2d Cir. Certiorari denied. Reported below: 23 F. 3d 652 (first case) and 660 (second case).

No. 94–608. CITY OF YONKERS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 29 F. 3d 40.

No. 94–1443. ADAMS ET AL. *v.* DICKINSON ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 646 So. 2d 717.

No. 94–1462. BAEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 41 F. 3d 19.

No. 94–1523. ALASKA *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1513.

No. 94–1528. SOLOMON ET AL. *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS & LOAN ASSN., F. A.; and

No. 94–1564. PATTULLO ET AL. *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS & LOAN ASSN., F. A. C. A. 2d Cir. Certiorari denied. Reported below: 45 F. 3d 665.

No. 94–1557. HERCULES INC. *v.* UNITED STATES; and

No. 94–1800. ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 46 F. 3d 803.

No. 94–1613. AMERICA'S BEST QUALITY COATINGS CORP. (ABQC) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 44 F. 3d 516.

No. 94–1641. MANARITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 F. 3d 1407.

No. 94–1642. STOLLINGS *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–1653. AMERICAN LIBRARY ASSN. ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 33 F. 3d 78.

No. 94–1665. ROWLAND ET UX. *v.* DEPARTMENT OF AGRICULTURE. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1112.

No. 94–1669. BRACE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 41 F. 3d 117.

No. 94–1684. Agricultural Labor Relations Board et al. *v.* Bud Antle, Inc., dba Bud of California. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 1261.

No. 94–1685. Kerr-McGee Coal Corp. *v.* Federal Mine Safety and Health Review Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 40 F. 3d 1257.

No. 94–1692. Johnson & Higgins *v.* Sempier. C. A. 3d Cir. Certiorari denied. Reported below: 45 F. 3d 724.

No. 94–1696. Hansen et al. *v.* Westerville City School District, Board of Education, et al.; and

No. 94–1826. Hayfield et al. *v.* McIntyre, Executor of the Estate of McIntyre, Deceased, et al. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1472.

No. 94–1702. Kelley, Attorney General of Michigan, et al. *v.* Selin et al. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1501.

No. 94–1703. Saleh, dba KB's Limited Fine Foods *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–1706. The Mill *v.* Colorado Department of Health et al. Sup. Ct. Colo. Certiorari denied. Reported below: 887 P. 2d 993.

No. 94–1738. Scott, Individually and as Personal Representative for the Estate of Scott, Deceased *v.* Henrich et al. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 912.

No. 94–1764. Intermountain Ranches, Ltd., et al. *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 436.

No. 94–1780. Gehring *v.* Case Corp. C. A. 7th Cir. Certiorari denied. Reported below: 43 F. 3d 340.

No. 94–1790. Wellington Trade Inc., dba Containerhouse *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 93.

No. 94–1799. SILANO *v.* SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 42 F. 3d 719.

No. 94–1801. GROUND IMPROVEMENT TECHNIQUES, INC., ET AL. *v.* COLUMBIA COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–1806. CHAWLA ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 46 F. 3d 1185.

No. 94–1808. PIERCE *v.* PIERCE. Sup. Ct. Miss. Certiorari denied. Reported below: 648 So. 2d 523.

No. 94–1812. FRIEDMAN *v.* TOLENTINO. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 645.

No. 94–1815. MILLER *v.* SANTA CRUZ COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1030.

No. 94–1816. BLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BLAS AND AS GUARDIAN FOR THE MINOR, BORJA *v.* CHARFAUROS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1138.

No. 94–1820. DARRAH ET UX. *v.* CHILDREN'S HOME SOCIETY OF CALIFORNIA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 29 Cal. App. 4th 511, 35 Cal. Rptr. 2d 291.

No. 94–1821. TRULY, SECRETARY, LOUISIANA DEPARTMENT OF LABOR *v.* BAYOU STEEL CORP. ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 645 So. 2d 779.

No. 94–1822. W. R. GRACE & CO. ET AL. *v.* WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 193 W. Va. 119, 454 S. E. 2d 413.

No. 94–1824. CONNOR *v.* WESTERN PENNSYLVANIA TEAMSTERS & EMPLOYEES PENSION FUND. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1460.

No. 94–1830. ROGERS ET VIR *v.* CORROSION PRODUCTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 292.

No. 94–1832. Martello *v.* CIBA Vision Corp. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 3d 1167.

No. 94–1833. Moser et al. *v.* Federal Communications Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 970.

No. 94–1835. Sanders *v.* Los Angeles Unified School District et al. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1402.

No. 94–1836. National Association of Government Employees et al. *v.* Massachusetts et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 419 Mass. 448, 646 N. E. 2d 106.

No. 94–1840. Borza et al. *v.* Hallmark Cards, Inc., t/a Ambassador Cards, et al. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 425.

No. 94–1843. Edgerton Sand & Gravel, Inc. *v.* General Casualty Company of Wisconsin et al. Sup. Ct. Wis. Certiorari denied. Reported below: 184 Wis. 2d 750, 517 N. W. 2d 463.

No. 94–1844. Young *v.* Immigration and Naturalization Service et al. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 536.

No. 94–1847. Multnomah County *v.* Johnson. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 420.

No. 94–1862. Williams *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 248 Va. 528, 450 S. E. 2d 365.

No. 94–1870. Marullo et al. *v.* Cassanova et al. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–1882. Umbehr *v.* Heiser et al. C. A. 10th Cir. Certiorari denied. Reported below: 44 F. 3d 876.

No. 94–1906. Scott *v.* Dodge Correctional Institution. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 534.

No. 94–1915. Shumate *v.* NationsBank et al. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 427.

No. 94–1935. WELCH ET AL. *v.* WELCH, ADMINISTRATOR OF THE ESTATE OF WELCH, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 265 Ga. 89, 453 S. E. 2d 445.

No. 94–1949. MUSCATELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 627.

No. 94–6153. GUINN *v.* HESSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 19 F. 3d 33.

No. 94–7343. RICHARDSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 901 S. W. 2d 941.

No. 94–8365. ROBISON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 888 S. W. 2d 473.

No. 94–8381. BIGBY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 892 S. W. 2d 864.

No. 94–8679. SANTIAGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 885.

No. 94–8771. VOLGES *v.* RESOLUTION TRUST CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 32 F. 3d 50.

No. 94–8818. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8920. HIGHTOWER *v.* THOMAS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 94–9009. HEATH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 648 So. 2d 660.

No. 94–9036. CRAWFORD *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 892 S. W. 2d 716.

No. 94–9042. PRUNTY *v.* ROGERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1472.

No. 94–9060. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 94–9067. TILLI *v.* SOWECKE ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–9068. Tuggle *v.* Edmondson, Attorney General of Oklahoma, et al. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1152.

No. 94–9071. Giles *v.* Parker, Warden. C. A. 11th Cir. Certiorari denied.

No. 94–9080. Lazzell *v.* Cain, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 530.

No. 94–9085. Preblich *v.* Battley. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1144.

No. 94–9089. Lane *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 943.

No. 94–9093. Bell *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 363, 450 S. E. 2d 710.

No. 94–9095. Bergmann *v.* Nieske. C. A. 7th Cir. Certiorari denied.

No. 94–9096. Everette *v.* Roth, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 257.

No. 94–9097. Alexander *v.* Ward, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 424.

No. 94–9107. Dawson *v.* Thomas, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1071.

No. 94–9108. Harrison *v.* Whitley, Warden. C. A. 5th Cir. Certiorari denied.

No. 94–9116. Woods *v.* FCC National Bank. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 94–9118. Keithley *v.* Hopkins, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 43 F. 3d 1216.

No. 94–9122. Riggins *v.* Washington, Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied. Reported below: 50 F. 3d 492.

No. 94–9126. Heller *v.* Steindler et al. C. A. 6th Cir. Certiorari denied.

No. 94–9128. SUMMERS *v.* WELBORN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1225.

No. 94–9129. POE *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 3d 1173.

No. 94–9130. PAGE *v.* PUNG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 48 F. 3d 1224.

No. 94–9131. STEPHEN *v.* ZULFACAR. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1145.

No. 94–9132. REEDOM *v.* MOSLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1041.

No. 94–9133. ORR *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1143.

No. 94–9137. M. M. *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 20 Kan. App. 2d xvii, 888 P. 2d 414.

No. 94–9138. JOHNSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 71 Ohio St. 3d 332, 643 N. E. 2d 1098.

No. 94–9142. SUDDUTH *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 94–9143. RODRIGUEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 94–9146. BRUNNER *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 94–9148. SCHORN *v.* MACK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–9150. SCUDDER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 71 Ohio St. 3d 263, 643 N. E. 2d 524.

No. 94–9158. BURNETT *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 1005.

No. 94–9159. COOPER *v.* NASH ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–9165. McCall *v.* Delo, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 41 F. 3d 1219.

No. 94–9166. Boothe *v.* Equifax Credit Information Services. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–9167. Atkins *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 965 F. 2d 952.

No. 94–9169. Benton *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 94–9175. Roaquin *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 47 F. 3d 1182.

No. 94–9177. Pudder, aka Cromar *v.* Irwin et al. C. A. 10th Cir. Certiorari denied. Reported below: 51 F. 3d 285.

No. 94–9184. Walker *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 648 So. 2d 914.

No. 94–9185. Kyong Sik Kim *v.* Virginia et al. Sup. Ct. Va. Certiorari denied.

No. 94–9187. Wanless *v.* Parks et al. Sup. Ct. Okla. Certiorari denied.

No. 94–9189. Goynes *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 94–9191. Davis *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 94–9195. Thayer *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied.

No. 94–9211. Alexander *v.* Macoubrie et al. C. A. 8th Cir. Certiorari denied. Reported below: 51 F. 3d 277.

No. 94–9212. Arteaga *v.* United States District Court for the Northern District of California. C. A. 9th Cir. Certiorari denied.

No. 94–9217. THOMAS *v.* MCCOTTER, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 49 F. 3d 1476.

No. 94–9232. COLEMAN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 48 F. 3d 1223.

No. 94–9261. MARI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 782.

No. 94–9294. HUNTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 430.

No. 94–9302. MARQUEZ-PAYARES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–9303. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–9322. MCNAIR, AKA TURNER *v.* UNITED STATES; and
No. 94–9329. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 48 F. 3d 535.

No. 94–9328. ROUTLY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1279.

No. 94–9332. HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1187.

No. 94–9338. DORTCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 48 F. 3d 1217.

No. 94–9362. LEGREE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 47 F. 3d 1166.

No. 94–9363. RENFROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–9371. SAMUEL-BEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 532.

No. 94–9377. MIGUEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 49 F. 3d 505.

No. 94–9382. WILKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 48 F. 3d 1560.

No. 94–9384. WU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 94–9385. TORRES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–9387. NEWBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1183.

No. 94–9388. BEEBE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 42 M. J. 100.

No. 94–9389. CLEVELAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1146.

No. 94–9392. RUFF *v.* BEAVER ET AL. Ct. App. Tenn. Certiorari denied.

No. 94–9400. FERNANDEZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–9401. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 461.

No. 94–9402. GENOA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1171.

No. 94–9403. EKWUNIFE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–9406. HERALD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 48 F. 3d 1225.

No. 94–9411. STARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 1229.

No. 94–9412. STRICKLAND *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 54 F. 3d 766.

No. 94–9414. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 50 F. 3d 294.

No. 94–9418. HOLMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 F. 3d 17.

No. 94–9419. Forney *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 54 F. 3d 774.

No. 94–9420. Hunter *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 1494.

No. 94–9426. Rice *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 49 F. 3d 378.

No. 94–9430. Griffin *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 48 F. 3d 1147.

No. 94–9431. Ronayne *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 53 F. 3d 332.

No. 94–9432. Adway *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1146.

No. 94–9433. Dorsey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 809.

No. 94–9442. Deason *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 49 F. 3d 731.

No. 94–9444. Short *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 1229.

No. 94–9446. Riley *v.* Newberry, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 94–9449. Woods *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 49 F. 3d 733.

No. 94–9451. Mendez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1045.

No. 94–9454. Perry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1128.

No. 94–9460. Baker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 691.

No. 94–9461. Ahaneku *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 52 F. 3d 322.

No. 94–9463. Burrows *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 48 F. 3d 1011.

No. 94–9466. JUDA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 961.

No. 94–9467. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 F. 3d 18.

No. 94–9468. VILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 F. 3d 1177.

No. 94–9469. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 1405.

No. 94–9470. VELASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 48 F. 3d 1222.

No. 94–9472. HOLLOWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 424.

No. 94–9479. SPRADLEY *v.* WHITE, CLERK, SUPREME COURT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 679.

No. 94–9483. LUNSFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–9484. MORAN-LEON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 F. 3d 1177.

No. 94–9491. JONES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 339 N. C. 114, 451 S. E. 2d 826.

No. 94–1811. CUTLER ET AL. *v.* PHILLIPS PETROLEUM CO. Sup. Ct. Wash. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 124 Wash. 2d 749, 881 P. 2d 216.

No. 94–1819. FOX ET AL. *v.* BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Motion of Student Association of the State University of New York, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 42 F. 3d 135.

No. 94–8806. AMSDEN *v.* SENATE JUDICIARY COMMITTEE ET AL. C. A. 1st Cir. Certiorari before judgment denied. JUSTICE

Breyer took no part in the consideration or decision of this petition.

Rehearing Denied

No. 94–802. **Purkett, Superintendent, Farmington Correctional Center** *v.* **Elem**, 514 U. S. 765;

No. 94–1460. **Culp** *v.* **Wismer & Becker et al.**, 514 U. S. 1108;

No. 94–1529. **Hudson** *v.* **First Fidelity Bank, N. A., New Jersey, fka First National State Bank**, 514 U. S. 1108;

No. 94–1543. **Warren** *v.* **Kentucky**, 514 U. S. 1109;

No. 94–1574. **Kaliardos** *v.* **General Motors Corp. et al.**, 514 U. S. 1110;

No. 94–1619. **Douglas** *v.* **First Security Federal Savings Bank et al.**, 514 U. S. 1128;

No. 94–8255. **Litzenberg** *v.* **Carr, Judge, Circuit Court of Maryland, Harford County, et al.**, 514 U. S. 1085;

No. 94–8313. **Price** *v.* **Runyon, Postmaster General**, 514 U. S. 1114;

No. 94–8374. **Fenelon** *v.* **United States Postal Service**, 514 U. S. 1114; and

No. 94–8683. **White** *v.* **Singletary, Secretary, Florida Department of Corrections**, 514 U. S. 1131. Petitions for rehearing denied.

No. 94–7778. **Darby** *v.* **United States**, 514 U. S. 1097. Motion for leave to file petition for rehearing denied.

June 27, 1995

Dismissal Under Rule 46

No. 94–9205. **In re Vey.** Petition for writ of habeas corpus dismissed under this Court's Rule 46.

June 29, 1995

Affirmed and Dismissed on Appeal

No. 94–275. **DeWitt et al.** *v.* **Wilson, Governor of California, et al.** Appeal from D. C. E. D. Cal. With respect to Questions 1 through 4 presented by the statement as to jurisdiction, judgment affirmed. With respect to Questions 5 and 6, appeal dismissed. Reported below: 856 F. Supp. 1409.

Certiorari Granted—Vacated and Remanded

No. 94–1242. KNIGHTS OF COLUMBUS COUNCIL NO. 2961 ET AL. *v.* TOWN OF TRUMBULL ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Capitol Square Review and Advisory Bd.* v. *Pinette*, *ante*, p. 753. Reported below: 67 F. 3d 290.

Miscellaneous Orders

No. D–1532. IN RE DISBARMENT OF CRAWFORD. Disbarment entered. [For earlier order herein, see 514 U. S. 1060.]

No. D–1566. IN RE DISBARMENT OF CRIKELAIR. It is ordered that Paul B. Crikelair, of Ventura, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1567. IN RE DISBARMENT OF OLSEN. It is ordered that Kim David Olsen, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1568. IN RE DISBARMENT OF LIDA. It is ordered that Norman I. Lida, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1569. IN RE DISBARMENT OF KELLY. It is ordered that Leo C. Kelly, of Albuquerque, N. M., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1570. IN RE DISBARMENT OF WHEELER. It is ordered that Gregory H. Wheeler, of Mt. Laurel, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1571. In re Disbarment of Peck. It is ordered that Michael Allan Peck, of Hartford, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1572. In re Disbarment of Giampa. It is ordered that Richard L. Giampa, of Peekskill, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1573. In re Disbarment of Hoppmann. It is ordered that Barbara E. Hoppmann, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 94–8845. Tabas *v.* United States. C. A. 3d Cir. Motion of petitioner to consolidate this petition with No. 94–7427, *Libretti* v. *United States* [certiorari granted, 514 U. S. 1035], denied.

Probable Jurisdiction Noted

No. 94–805. Bush, Governor of Texas, et al. *v.* Vera et al.;

No. 94–806. Lawson et al. *v.* Vera et al.; and

No. 94–988. United States *v.* Vera et al. Appeals from D. C. S. D. Tex. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 861 F. Supp. 1304.

No. 94–923. Shaw et al. *v.* Hunt, Governor of North Carolina, et al.; and

No. 94–924. Pope et al. *v.* Hunt, Governor of North Carolina, et al. Appeals from D. C. E. D. N. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 861 F. Supp. 408.

Certiorari Granted

No. 94–1654. Heiser et al. *v.* Umbehr. C. A. 10th Cir. Certiorari granted. Reported below: 44 F. 3d 876.

No. 95–5015 (A–2). LONCHAR *v.* THOMAS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. THE CHIEF JUSTICE and JUSTICE SCALIA would deny the application for stay and the petition for writ of certiorari. Reported below: 58 F. 3d 590.

Certiorari Denied

No. 94–1299. SCHOOL DISTRICT OF THE CITY OF LADUE, MISSOURI, ET AL. *v.* GOOD NEWS/GOOD SPORTS CLUB ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 28 F. 3d 1501.

No. 94–1423. PELOZA *v.* CAPISTRANO UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 517.

JUNE 30, 1995

Certiorari Denied

No. 95–5017 (A–3). STAFFORD *v.* WARD, WARDEN. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 60 F. 3d 668.

No. 95–5021 (A–13). STAFFORD *v.* WARD, WARDEN, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution of sentence of death. Reported below: 59 F. 3d 1025.

No. 95–5029 (A–12). STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 899 P. 2d 657.

JULY 17, 1995

Certiorari Denied

No. 95–5195 (A–41). BOLENDER *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 658 So. 2d 82.

July 18, 1995

Miscellaneous Order

No. A–50. Bolender *v.* Singletary, Secretary, Florida Department of Corrections. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Justice Scalia took no part in the consideration or decision of this application.

Certiorari Denied

No. 95–5230 (A–49). Bolender *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Certiorari denied. Justice Scalia took no part in the consideration or decision of this application and this petition. Reported below: 661 So. 2d 278.

July 26, 1995

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see *post,* p. 1196.)

July 27, 1995

Dismissal Under Rule 46

No. 94–2032. Franklin et al. *v.* Beasley, Governor of South Carolina, et al. Appeal from D. C. S. C. Stipulation to dismiss the appeal as to David Beasley, Governor of South Carolina; Edwin Huggins, Willard Lawrimore, and J. Wesley Kennedy, as Members of the Hemingway Annexation Steering Committee; and the Hemingway Annexation Steering Committee filed, and appeal dismissed as to these appellees under this Court's Rule 46.1.

July 28, 1995

Miscellaneous Orders

No. A–947. Fleschner et al. *v.* United States. Application for bail, addressed to Justice Thomas and referred to the Court, denied.

No. A–34 (O. T. 1995). Wolfberg et ux. *v.* Greenberg. C. A. 10th Cir. Application for stay, addressed to Justice Kennedy and referred to the Court, denied.

July 31, 1995

Rehearing Denied

No. 94–8922 (A–73). Brecheen *v.* Ward, Warden, *ante,* p. 1135. Application for stay of execution of sentence of death, presented to Justice Breyer, and by him referred to the Court, denied. Petition for rehearing denied.

August 3, 1995

Dismissal Under Rule 46

No. 94–1978. Farmer *v.* Hawk, Director, Federal Bureau of Prisons, et al. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 19 F. 3d 36.

August 10, 1995

Dismissal Under Rule 46

No. 94–2077. Fitzgerald et al. *v.* Mountain States Telephone & Telegraph Co., dba U. S. West Communications, Inc. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.

August 11, 1995

Miscellaneous Orders

No. D–1333. In re Disbarment of Sharp. Disbarment entered. [For earlier order herein, see 510 U. S. 987.]

No. D–1365. In re Disbarment of Micelli. It having been reported to the Court that Nicholas Angelo Micelli, of Los Angeles, Cal., has died, the rule to show cause, heretofore issued on February 22, 1994 [510 U. S. 1105], is hereby discharged.

No. D–1535. In re Disbarment of Frankum. Disbarment entered. [For earlier order herein, see 514 U. S. 1061.]

No. D–1542. In re Disbarment of Kitsos. Disbarment entered. [For earlier order herein, see 514 U. S. 1081.]

No. D–1546. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see 514 U. S. 1106.]

No. D–1547. In re Disbarment of Sealy. Disbarment entered. [For earlier order herein, see 514 U. S. 1106.]

No. D–1548. IN RE DISBARMENT OF DICKINSON. Disbarment entered. [For earlier order herein, see 514 U. S. 1106.]

No. D–1549. IN RE DISBARMENT OF JAN. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1550. IN RE DISBARMENT OF DIUGUID. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1551. IN RE DISBARMENT OF WEEKS. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1554. IN RE DISBARMENT OF OFFNER. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1555. IN RE DISBARMENT OF FEIT. Disbarment entered. [For earlier order herein, see *ante,* p. 1129.]

No. D–1556. IN RE DISBARMENT OF WARTER. Disbarment entered. [For earlier order herein, see *ante,* p. 1129.]

No. D–1557. IN RE DISBARMENT OF HILGENDORF. Disbarment entered. [For earlier order herein, see *ante,* p. 1129.]

No. D–1574. IN RE DISBARMENT OF MUHAMMAD. It is ordered that Ahmad Raheem Muhammad, of Lorman, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1575. IN RE DISBARMENT OF ROSENBLUM. It is ordered that Sheldon Rosenblum, of Little Neck, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1576. IN RE DISBARMENT OF ROSS. It is ordered that John Michael Ross, of El Cajon, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1577. IN RE DISBARMENT OF ORTMAN. It is ordered that William Andrew Ortman, of Farmington Hills, Mich., be suspended from the practice of law in this Court and that a rule

issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1578. In re Disbarment of Thrower. It is ordered that John Snow Thrower, Jr., of Opelika, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1579. In re Disbarment of Kohnen. It is ordered that David A. Kohnen, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1580. In re Disbarment of Ewers. It is ordered that James J. Ewers, of Yankton, S. D., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1581. In re Disbarment of Crawford. It is ordered that Desiree White Crawford, of Henderson, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1582. In re Disbarment of Kellner. It is ordered that Fred Neal Kellner, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1583. In re Disbarment of Tache. It is ordered that Simon W. Tache, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1584. In re Disbarment of Felman. It is ordered that David Sherman Felman, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Certiorari Denied

No. 95–5328 (A–123). SATTIEWHITE *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 53 F. 3d 1281.

No. 95–5543 (A–138). BRECHEEN *v.* WARD, WARDEN. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 62 F. 3d 1428.

Rehearing Denied

No. D–1485. IN RE DISBARMENT OF JACOBS, *ante*, p. 1139;
No. 93–9218. BOYD *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, 513 U. S. 837;
No. 94–1339. MALTBY *v.* WINSTON ET AL., *ante*, p. 1141;
No. 94–1388. BERRY ET AL. *v.* PARRISH, KANSAS SECURITIES COMMISSIONER, 514 U. S. 1064;
No. 94–1482. CLOUSER ET AL. *v.* GLICKMAN, SECRETARY OF AGRICULTURE, ET AL., *ante*, p. 1141;
No. 94–1521. SPENCER *v.* MRS. BAIRD'S BAKERIES, INC., ET AL., 514 U. S. 1108;
No. 94–1532. PARKING ASSOCIATION OF GEORGIA, INC., ET AL. *v.* CITY OF ATLANTA, GEORGIA, *ante*, p. 1116;
No. 94–1551. SNEAD ET AL. *v.* GOODYEAR TIRE & RUBBER CO., 514 U. S. 1096;
No. 94–1607. NEAL *v.* BROWN ET AL., 514 U. S. 1127;
No. 94–1672. SHUMATE *v.* NCNB CORP., *ante*, p. 1104;
No. 94–1680. WILSON *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD ET AL., *ante*, p. 1104;
No. 94–1733. TURNER, AKA FOUTZ *v.* UNITED STATES, *ante*, p. 1104;
No. 94–1759. ELLINGTON ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL., *ante*, p. 1143;
No. 94–1781. ATTORNEY R *v.* MISSISSIPPI BAR, *ante*, p. 1144;
No. 94–1852. ALLEY *v.* GENERAL ELECTRIC CAPITAL CORP., *ante*, p. 1145;

No. 94–7286. PERRYMAN *v.* PRADO, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, 513 U. S. 1166;

No. 94–7789. DEBARDELEBEN *v.* QUINLAN ET AL., *ante,* p. 1105;

No. 94–8195. MCCULLUM *v.* JACKSON PUBLIC SCHOOL DISTRICT, 514 U. S. 1070;

No. 94–8273. HUDSPETH *v.* UNITED STATES, *ante,* p. 1105;

No. 94–8377. CHASE *v.* MISSISSIPPI, *ante,* p. 1123;

No. 94–8379. MARTIN *v.* LOUISIANA, *ante,* p. 1105;

No. 94–8502. BARWICK *v.* CITY OF AURORA, COLORADO, ANIMAL CARE DIVISION, 514 U. S. 1117;

No. 94–8560. CSOKA *v.* UNITED STATES ET AL., 514 U. S. 1119;

No. 94–8576. GAMBLE *v.* TERRY, 514 U. S. 1119;

No. 94–8628. IN RE BEARDEN, 514 U. S. 1126;

No. 94–8655. MASON *v.* CALIFORNIA, 514 U. S. 1131;

No. 94–8666. BROWN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 514 U. S. 1131;

No. 94–8675. BLACKSTON *v.* BECKER, JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ET AL., *ante,* p. 1133;

No. 94–8705. DOUGLASS *v.* ESTATE OF DOUGLASS, *ante,* p. 1106;

No. 94–8707. WEEKS *v.* KAY & ASSOCIATES, INC., 514 U. S. 1120;

No. 94–8712. MARTIN *v.* PETERS ET AL., *ante,* p. 1106;

No. 94–8722. ROBERTS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante,* p. 1133;

No. 94–8725. BRANNON *v.* LAMAINA; and HINTE *v.* SHUPE, *ante,* p. 1106;

No. 94–8734. WATSON *v.* MONROE, WARDEN, *ante,* p. 1106;

No. 94–8775. WALLACE, AKA COLE *v.* WALLACE, *ante,* p. 1107;

No. 94–8778. VOHRA *v.* SIKAND ENGINEERING ASSOCIATES ET AL., *ante,* p. 1123;

No. 94–8780. WILLIAMS *v.* RUNYON, POSTMASTER GENERAL, *ante,* p. 1123;

No. 94–8781. MILLER *v.* WHITE, WARDEN, *ante,* p. 1123;

No. 94–8786. ADAMS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *ante,* p. 1124;

No. 94–8802. SWAIN *v.* VIRGINIA, *ante,* p. 1124;

No. 94–8843. SIBAY *v.* CRESTAR FINANCIAL CORP. ET AL., *ante*, p. 1125;

No. 94–8844. BUSCH *v.* NIX ET AL., *ante*, p. 1133;

No. 94–8846. JACOBS *v.* SUPREME COURT OF MISSOURI, *ante*, p. 1133;

No. 94–8856. IGNACIO *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 1125;

No. 94–8904. JONES *v.* ROADWAY EXPRESS, INC., *ante*, p. 1135;

No. 94–8927. JONES ET AL. *v.* NORTH WOODLAND HILLS COMMUNITY ASSN., *ante*, p. 1135;

No. 94–8941. ALEXANDER *v.* JOHNSON ET AL., *ante*, p. 1146;

No. 94–8954. VOHRA *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD ET AL., *ante*, p. 1146;

No. 94–8958. SCHWARZ *v.* INTERPOL ET AL., *ante*, p. 1146;

No. 94–8959. SCHWARZ *v.* CHURCH OF SCIENTOLOGY INTERNATIONAL ET AL., *ante*, p. 1146;

No. 94–8978. WOOD *v.* ARIZONA, *ante*, p. 1147;

No. 94–8991. MINCEY *v.* THOMAS, WARDEN, *ante*, p. 1147;

No. 94–9017. TOBIAS *v.* TEXAS, *ante*, p. 1126;

No. 94–9051. HUNDLEY *v.* UNITED STATES, *ante*, p. 1109;

No. 94–9063. MORGAN *v.* MACDONALD ET AL., *ante*, p. 1148;

No. 94–9071. GILES *v.* PARKER, WARDEN, *ante*, p. 1163;

No. 94–9097. ALEXANDER *v.* WARD, WARDEN, *ante*, p. 1163;

No. 94–9160. BUTLER *v.* RICHARDS ET AL., *ante*, p. 1136;

No. 94–9190. FREEMAN *v.* CALIFORNIA, *ante*, p. 1149;

No. 94–9206. AZIZ *v.* UNITED STATES, *ante*, p. 1128;

No. 94–9222. SMITH *v.* DRUG ENFORCEMENT AGENCY ET AL., *ante*, p. 1128;

No. 94–9232. COLEMAN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 1166;

No. 94–9235. MARK *v.* UNITED STATES, *ante*, p. 1149;

No. 94–9267. CARROLL ET AL. *v.* UNITED STATES, *ante*, p. 1150;

No. 94–9273. LOCKETT *v.* MISSISSIPPI, *ante*, p. 1150;

No. 94–9274. LOCKETT *v.* MISSISSIPPI, *ante*, p. 1150;

No. 94–9348. WALDEMER *v.* UNITED STATES, *ante*, p. 1151; and

No. 94–9392. RUFF *v.* BEAVER ET AL., *ante*, p. 1167. Petitions for rehearing denied.

No. 94–1404. ATTAR ET AL. *v.* UNITED STATES, 514 U. S. 1107. Motion of petitioner Amir James Attar for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 94–7212. CUPIT *v.* WHITLEY, WARDEN, 513 U. S. 1163; and
No. 94–8440. BOAL *v.* DEPARTMENT OF THE ARMY, 514 U. S. 1116. Motions for leave to file petitions for rehearing denied.

AUGUST 15, 1995

Miscellaneous Order

No. A–156 (O. T. 1995). MOSER, BY AND THROUGH HOLLAND *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. Application to vacate the stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

AUGUST 16, 1995

Miscellaneous Orders

No. A–158 (O. T. 1995). MOSER, BY AND THROUGH HOLLAND *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. Application to vacate the order of the United States Court of Appeals for the Third Circuit, presented to JUSTICE SOUTER, and by him referred to the Court, denied. CHIEF JUSTICE REHNQUIST would grant the application to vacate.

No. A–159 (O. T. 1995). MOSER, BY AND THROUGH HOLLAND *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. Application to vacate the stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

AUGUST 17, 1995

Miscellaneous Orders

No. A–163 (O. T. 1995). ADAMS *v.* MOORE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–164 (O. T. 1995). ADAMS *v.* MOORE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

AUGUST 31, 1995

Certiorari Denied

No. 95–5789 (A–201). FAIRCHILD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 1, 1995

Vacated and Remanded After Certiorari Granted

No. 94–1660. AMERICAN AIRLINES, INC. *v.* LOCKWOOD. C. A. Fed. Cir. [Certiorari granted, *ante,* p. 1121.] Judgment vacated and case remanded to the United States District Court for the Southern District of California with instructions to proceed with the case.

Miscellaneous Orders

No. D–1552. IN RE DISBARMENT OF CACIOPPO. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1559. IN RE DISBARMENT OF CREWELL. Disbarment entered. [For earlier order herein, see *ante,* p. 1140.]

No. D–1562. IN RE DISBARMENT OF BARLOW. Disbarment entered. [For earlier order herein, see *ante,* p. 1155.]

No. D–1565. IN RE DISBARMENT OF GOULD. Disbarment entered. [For earlier order herein, see *ante,* p. 1156.]

No. D–1566. IN RE DISBARMENT OF CRIKELAIR. Disbarment entered. [For earlier order herein, see *ante,* p. 1171.]

No. D–1568. IN RE DISBARMENT OF LIDA. Disbarment entered. [For earlier order herein, see *ante,* p. 1171.]

No. D–1579. IN RE DISBARMENT OF KOHNEN. David A. Kohnen, of Cincinnati, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on August 11, 1995 [*ante*, p. 1177], is hereby discharged.

No. D–1585. In re Disbarment of Palmisano. It is ordered that Joseph Christopher Palmisano, of Scottsdale, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 94–1359. Clements et al. *v.* United States, 514 U. S. 1107;

No. 94–8558. Bell *v.* Washington, Warden, 514 U. S. 1119;

No. 94–8577. Hubbard *v.* Lowe, 514 U. S. 1100;

No. 94–8804. In re Sato, *ante*, p. 1130;

No. 94–8920. Hightower *v.* Thomas, Warden, *ante*, p. 1162;

No. 94–8938. Hays *v.* Arends et al., *ante*, p. 1135;

No. 94–9067. Tilli *v.* Sowecke et al., *ante*, p. 1162;

No. 94–9095. Bergmann *v.* Nieske, *ante*, p. 1163;

No. 94–9115. In re Awofolu, *ante*, p. 1157;

No. 94–9185. Kyong Sik Kim *v.* Virginia et al., *ante*, p. 1165;

No. 94–9192. Green *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division, *ante*, p. 1149;

No. 94–9212. Arteaga *v.* United States District Court for the Northern District of California, *ante*, p. 1165;

No. 94–9217. Thomas *v.* McCotter, Executive Director, Utah Department of Corrections, et al., *ante*, p. 1166; and

No. 94–9491. Jones *v.* North Carolina, *ante*, p. 1169. Petitions for rehearing denied.

Assignment Order

An order of The Chief Justice designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period from September 25, 1995, through June 7, 1996, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

SEPTEMBER 8, 1995

Dismissal Under Rule 46

No. 95–276. GROSSI *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 48 F. 3d 1452.

Miscellaneous Order

No. 95–132 (A–181). VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL. Appeal from D. C. N. D. Ohio. Application for stay of orders issued by the United States District Court for the Northern District of Ohio in case No. 5:91CV–2219 on April 28, May 26, and August 11, 1995, presented to JUSTICE STEVENS, and by him referred to the Court, granted pending further order of this Court. It is further ordered that appellees' motion to dismiss or affirm in case No. 95–378, *Voinovich, Governor of Ohio, et al.* v. *Quilter, Speaker Pro Tempore of Ohio House of Representatives, et al.*, shall be filed within 10 days of the date of this order.

SEPTEMBER 11, 1995

Dismissals Under Rule 46

No. 122, Orig. TEXAS ET AL. *v.* LOUISIANA ET AL. Motion for leave to file bill of complaint dismissed under this Court's Rule 46.1.

No. 94–2125. HANSEN ET AL. *v.* MIDLANTIC NATIONAL BANK. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 48 F. 3d 693.

SEPTEMBER 13, 1995

Miscellaneous Orders

No. A–251 (O. T. 1995). LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JEFFERS. Application to vacate the stay of execution of sentence of death granted by the United States Court of Appeals for the Ninth Circuit on September 13, 1995, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–1553. In re Disbarment of Brown. Disbarment entered. [For earlier order herein, see *ante,* p. 1120.]

No. D–1560. In re Disbarment of Washington. Disbarment entered. [For earlier order herein, see *ante,* p. 1140.]

No. D–1561. In re Disbarment of Fusilier. Disbarment entered. [For earlier order herein, see *ante,* p. 1155.]

No. D–1563. In re Disbarment of Robertson. Disbarment entered. [For earlier order herein, see *ante,* p. 1155.]

No. D–1567. In re Disbarment of Olsen. Disbarment entered. [For earlier order herein, see *ante,* p. 1171.]

No. D–1569. In re Disbarment of Kelly. Disbarment entered. [For earlier order herein, see *ante,* p. 1171.]

No. D–1570. In re Disbarment of Wheeler. Disbarment entered. [For earlier order herein, see *ante,* p. 1171.]

No. D–1586. In re Disbarment of Glassman. It is ordered that John Steven Glassman, of Tacoma, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1587. In re Disbarment of Genins. It is ordered that John Genins, of Atlanta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1588. In re Disbarment of Jackson. It is ordered that Gregory Keith Jackson, of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 121, Orig. Louisiana *v.* Mississippi et al. Motion of defendants for divided argument granted. [For earlier order herein, see, *e. g.,* 514 U. S. 1002.]

No. 94–967. Field et al. *v.* Mans. C. A. 1st Cir. [Certiorari granted, 514 U. S. 1095.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–1244. BEHRENS *v.* PELLETIER. C. A. 9th Cir. [Certiorari granted, 514 U. S. 1035.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–1471. VARITY CORP. *v.* HOWE ET AL. C. A. 8th Cir. [Certiorari granted, 514 U. S. 1082.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–8729. BENNIS *v.* MICHIGAN. Sup. Ct. Mich. [Certiorari granted, *ante,* p. 1121.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–1140. 44 LIQUORMART, INC., ET AL. *v.* RHODE ISLAND ET AL. C. A. 1st Cir. [Certiorari granted, 514 U. S. 1095.] Motion of respondent Rhode Island Liquor Stores Association for divided argument denied.

No. 94–1175. BANK ONE CHICAGO, N. A. *v.* MIDWEST BANK & TRUST CO. C. A. 7th Cir. [Certiorari granted, *ante,* p. 1157.] Motion of Electronic Check Clearing House Organization for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–1361. ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KOLE, ET AL. *v.* KOREAN AIR LINES CO., LTD.; and

No. 94–1477. KOREAN AIR LINES CO., LTD. *v.* ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KOLE, ET AL. C. A. 2d Cir. [Certiorari granted, 514 U. S. 1062.] Motion of Pan American World Airways, Inc., for leave to file a brief as *amicus curiae* granted.

No. 94–1387. YAMAHA MOTOR CORP., U. S. A., ET AL. *v.* CALHOUN ET AL., INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF CALHOUN, DECEASED. C. A. 3d Cir. [Certiorari granted, 514 U. S. 1126.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Maritime Law Association of the United States for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 94–1530. THINGS REMEMBERED, INC. *v.* PETRARCA. C. A. 6th Cir. [Certiorari granted, 514 U. S. 1095.] Motion of Connecticut Bar Association, Commercial Law and Bankruptcy Section, for leave to file a brief as *amicus curiae* granted.

No. 94–1592. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 1141.] Motion of the Solicitor General for divided argument granted.

No. 94–1809. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* EPSTEIN ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1141.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

Certiorari Denied

No. 95–5956 (A–256). JEFFERS *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition. Reported below: 68 F. 3d 299.

SEPTEMBER 15, 1995

Dismissal Under Rule 46

No. 94–2054. NATIONAL ENVIRONMENTAL SERVICES CO., DBA NESCO, ET AL. *v.* TRACER RESEARCH CORP. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 42 F. 3d 1292.

Certiorari Denied

No. 94–9112. STOCKTON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 920.

SEPTEMBER 18, 1995

Certiorari Denied

No. 95–5990 (A–263). JOHNSON *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION.

C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 68 F. 3d 470.

SEPTEMBER 19, 1995

Miscellaneous Order

No. A–277 (O. T. 1995). ALBANESE *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice White (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit during the period October 18 through October 19, 1995, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

SEPTEMBER 20, 1995

Dismissal Under Rule 46

No. 94–9791. IN RE PELTIER. C. A. 8th Cir. Petition for writ of habeas corpus or in the alternative petition for writ of certiorari dismissed under this Court's Rule 46.

SEPTEMBER 21, 1995

Miscellaneous Orders

No. A–270 (95–6016). TUGGLE *v.* NETHERLAND, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. A–285 (O. T. 1995). THOMPSON, AS NEXT FRIEND OF INGLE *v.* FRENCH, WARDEN. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

SEPTEMBER 26, 1995

Dismissals Under Rule 46

No. 95–5016. JACKSON *v.* JONES, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 42 F. 3d 1350.

No. 95–25. SILVA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari dismissed as to Edward Silva and Silva Harvesting under this Court's Rule 46. Reported below: 51 F. 3d 203.

Certiorari Denied

No. 95–5076. VAUGHN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

SEPTEMBER 27, 1995

Miscellaneous Orders

No. A–241 (O. T. 1995). OWENS-CORNING FIBERGLAS CORP. *v.* REKDAHL ET UX. Application for stay of judgment, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted to the extent that the execution and enforcement of the punitive damages portion of the judgment of the Court of Appeal of California, Second Appellate District, Division Three, case No. B068259, entered on May 25, 1995, and modified on June 20, 1995, is stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this application.*

No. A–302 (O. T. 1995). STOCKTON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1192.]

Certiorari Granted

No. 94–1614. WISCONSIN *v.* CITY OF NEW YORK ET AL.;

No. 94–1631. OKLAHOMA *v.* CITY OF NEW YORK ET AL.; and

No. 94–1985. DEPARTMENT OF COMMERCE ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 34 F. 3d 1114.

No. 94–1664. KOON *v.* UNITED STATES; and

No. 94–8842. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari in No. 94–1664 granted limited to Question 1 presented by the petition. Motion of petitioner in No. 94–8842 for leave to proceed *in forma pauperis* granted. Certiorari in No. 94–8842 granted limited to Question 4 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 34 F. 3d 1416.

No. 94–1837. BARNETT BANK OF MARION COUNTY, N. A. *v.* GALLAGHER, FLORIDA INSURANCE COMMISSIONER, ET AL. C. A. 11th Cir. Motion of Consumer Bankers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28,

1995. This Court's Rule 29.2 does not apply. Reported below: 43 F. 3d 631.

No. 94–1966. LOVING *v.* UNITED STATES. C. A. Armed Forces. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 41 M. J. 213.

No. 94–2003. LOTUS DEVELOPMENT CORP. *v.* BORLAND INTERNATIONAL, INC. C. A. 1st Cir. Motions of Intellectual Property Owners and Information Technology Industry Council for leave to file briefs as *amici curiae* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. JUSTICE STEVENS took no part in the consideration or decision of these motions and this petition. Reported below: 49 F. 3d 807.

No. 94–9247. CARLISLE *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 48 F. 3d 190.

No. 95–6. NORFOLK & WESTERN RAILWAY CO. *v.* HILES. App. Ct. Ill., 5th Dist. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 268 Ill. App. 3d 561, 644 N. E. 2d 508.

No. 95–26. MARKMAN ET AL. *v.* WESTVIEW INSTRUMENTS, INC., ET AL. C. A. Fed. Cir. Motion of American Board of Trial Advocates for leave to file a brief as *amicus curiae* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 52 F. 3d 967.

No. 95–83. MEGHRIG ET AL. *v.* KFC WESTERN, INC. C. A. 9th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. This Court's Rule 29.2 does not apply. Reported below: 49 F. 3d 518.

SEPTEMBER 28, 1995

Dismissal Under Rule 46

No. 94–2100. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1269 *v.* VIKMAN ET AL. Sup. Ct. Colo. Certiorari dismissed under this Court's Rule 46.1. Reported below: 889 P. 2d 646.

SEPTEMBER 29, 1995

Miscellaneous Orders

No. A–241 (O. T. 1995). OWENS-CORNING FIBERGLAS CORP. *v.* REKDAHL ET UX. Application for stay of judgment, presented to

JUSTICE O'CONNOR, and by her referred to the Court, granted. Execution and enforcement of that portion of the judgment of the Court of Appeal of California, Second Appellate District, Division Three, case No. B068259, entered on May 25, 1995, and modified on June 20, 1995, awarding punitive damages against applicant Owens-Corning Fiberglas Corp. is stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. A–249 (O. T. 1995). BABBITT, SECRETARY OF THE INTERIOR *v.* ENVIRONMENTAL DEFENSE CENTER. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Central District of California is stayed until October 31, 1995, or such earlier time as the United States Court of Appeals for the Ninth Circuit may take action on the Secretary's appeal. The Secretary remains at liberty to apply, in the first instance to the Court of Appeals, for an order extending the period of the stay in the event that the statutory restriction on the Secretary's commitment of funds is renewed. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED JULY 26, 1995

EFFECTIVE OCTOBER 2, 1995

The following are the Rules of the Supreme Court of the United States as revised on July 26, 1995. See *post,* p. 1196. The amended Rules became effective October 2, 1995, as provided in Rule 48, *post,* p. 1253.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, and 493 U. S. 1099.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 26, 1995

IT IS ORDERED that the revised Rules of this Court, today approved by the Court and lodged with the Clerk, shall be effective October 2, 1995, and be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated December 5, 1989, see 493 U. S. 1099, and all amendments to those Rules, shall be rescinded as of October 1, 1995, and that the Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending. See revised Rule 48.2.

RULES OF THE SUPREME COURT OF THE UNITED STATES

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RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED JULY 26, 1995—EFFECTIVE OCTOBER 2, 1995

PART I. THE COURT

Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. §6103.

Rule 2. Library

1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.

Rule 3. Term

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See 28 U. S. C. § 2. At the end of each Term, all cases pending on the docket are continued to the next Term.

Rule 4. Sessions and Quorum

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.

PART II. ATTORNEYS AND COUNSELORS

Rule 5. Admission to the Bar

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official

of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $100, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

Rule 6. Argument *Pro Hac Vice*

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice.*

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice.*

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice.* It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.

Rule 7. Prohibition Against Practice

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.

Rule 8. Disbarment and Disciplinary Action

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified.

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Rule 12. Review on Certiorari: How Sought; Parties

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion shall precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i. e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the ap-

pendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. Parties who file no document will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any

part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. §2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion

made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6.

(c) If the petition exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

> (i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);
>
> (ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;
>
> (iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;
>
> (iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and
>
> (v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not man-

datory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent may file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Rule 16. Disposition of a Petition for a Writ of Certiorari

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

PART IV. OTHER JURISDICTION

Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed,

with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte.*

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking

the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis,* a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The appendix shall include a copy of the notice of appeal showing the date it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment

sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i. e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the

appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 10 days after the motion is filed.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of

copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is received no more than 60 days after the date of the Clerk's letter, its filing will be deemed timely.

Rule 19. Procedure on a Certified Question

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis,* a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required,

when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

PART V. MOTIONS AND APPLICATIONS

Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argu-

ment on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1 shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Rule 22. Applications to Individual Justices

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is

to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

Rule 23. Stays

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See 28 U. S. C. § 2101(f).

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

PART VI. BRIEFS ON THE MERITS AND ORAL ARGUMENT

Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.*, App. 12, or to the record, *e. g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the page limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, *e. g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous

matter. The Court may disregard or strike a brief that does not comply with this paragraph.

Rule 25. Briefs on the Merits: Number of Copies and Time to File

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after receiving the brief for the petitioner or appellant.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after receiving the brief for the respondent or appellee, but any reply brief must actually be received by the Clerk no more than one week before the date of oral argument.

4. The time periods stated in paragraphs 1 and 2 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

5. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

6. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

7. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

Rule 26. Joint Appendix

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In

making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4. (a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule

25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

7. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

8. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Rule 27. Calendar

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

Rule 28. Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 no more than 15 days after the petitioner's or appellant's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed no more than 15 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely

why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

PART VII. PRACTICE AND PROCEDURE

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk.

2. A document is timely filed if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing. Commercial postage meter labels alone are not acceptable. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, the Clerk will require the person who mailed the document to submit a notarized statement or declaration in

compliance with 28 U. S. C. § 1746 setting out the details of the mailing and stating that the mailing took place on a particular date within the permitted time. A document also is timely filed if it is forwarded through a private delivery or courier service and is actually received by the Clerk within the time permitted for filing.

3. Any document required by these Rules to be served may be served personally or by mail on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office of the counsel of record, either to counsel or to an employee therein. If service is by mail, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, addressed to counsel of record at the proper post office address. When a party is not represented by counsel, service shall be made on the party, personally or by mail.

4. (a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N. W., Washington, DC 20530. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(a) may apply and shall be served on the Solicitor General of the

United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N. W., Washington, DC 20530. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of one or more corporations shall list all parent companies and nonwholly owned subsidiaries of each of the corporate filers. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier list appeared in an application for an extension of time or for a stay), and only amendments to the list to make it current need be included in the document being filed.

Rule 30. Computation and Extension of Time

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application seeking an extension shall be filed within the pe-

riod sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be received by the Clerk at least 10 days before the specified final filing date as computed under these Rules; if received less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. An application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The application may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Rule 31. Translations

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

Rule 32. Models, Diagrams, and Exhibits

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* (a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper, see, *e. g.*, Rules 21, 22, and 39, every document filed with the Court shall be prepared using typesetting (*e. g.*, wordprocessing, electronic publishing, or image setting) and reproduced by offset printing, photocopying, or similar process. The process used must produce a clear, black image on white paper.

(b) The text of every document, including any appendix thereto, except a document permitted to be produced on 8½- by 11-inch paper, shall be typeset in standard 11-point or larger type with 2-point or more leading between lines. The type size and face shall be no smaller than that contained in the United States Reports beginning with Volume 453. Type size and face shall be consistent throughout. No attempt should be made to reduce, compress, or condense the typeface in a manner that would increase the content of a document. Quotations in excess of three lines shall be indented. Footnotes shall appear in print as standard 9-point or larger type with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every document, except one permitted to be produced on 8½- by 11-inch paper, shall be produced on paper that is opaque, unglazed, 6⅛ by 9¼ inches in size, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, should be approximately 4⅛ by 7⅛ inches.

The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, and string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix.

(d) Every document, except one permitted to be produced on 8½- by 11-inch paper, shall comply with the page limits shown on the chart in subparagraph 1(g) of this Rule. The page limits do not include the pages containing the questions presented, the list of parties and corporate affiliates of the filing party, the table of contents, the table of cited authorities, or any appendix. Verbatim quotations required under Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the page limits, but application for such leave is not favored. An application to exceed page limits shall comply with Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every document, except one permitted to be produced on 8½- by 11-inch paper, shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a document prepared under this paragraph shall be filed.

(g) Page limits and cover colors for booklet-format documents are as follows:

	Type of Document	Page Limits	Color of Cover
(i)	Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	30	white
(ii)	Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4)	30	orange
(iii)	Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	10	tan
(iv)	Supplemental Brief (Rules 15.8, 17, 18.10, and 25.5)	10	tan
(v)	Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	50	light blue
(vi)	Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	50	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	20	yellow
(viii)	Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	50	orange
(ix)	Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	50	yellow
(x)	Brief for an *Amicus Curiae* at the Petition Stage (Rule 37.2)	20	cream
(xi)	Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	30	light green
(xii)	Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	30	dark green
(xiii)	Petition for Rehearing (Rule 44)	10	tan

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 8½- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The page exclusions specified in subparagraph 1(d) of this Rule apply.

Rule 34. Document Preparation: General Requirements

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the October Term in which the document is filed (see Rule 3);

(d) the caption of the case as appropriate in this Court;

(e) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "On Petition for

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(f) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(g) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 33.2), and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address and telephone number. Only one counsel of record may be noted on a single document. The names of other members of the Bar of this Court or of the bar of the highest court of a State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se*, in which case the party's name, address, and telephone number shall appear. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document exceeding five pages (other than a joint appendix), whether prepared under Rule 33.1 or Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(g) of this Rule, as may be desired.

Rule 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after filing a petition for a writ of certiorari to this Court, or after filing a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

Rule 37. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. The brief shall be submitted within the time allowed for filing a brief in opposition or for filing a motion to dismiss or affirm. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *ami-*

cus curiae brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed five pages. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

Rule 38. Fees

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. See 28 U. S. C. § 1915. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not

file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis.*

Rule 40. Veterans, Seamen, and Military Cases

1. A veteran suing to establish reemployment rights under 38 U. S. C. § 2022, or under any other provision of law exempting veterans from the payment of fees or court costs, may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to pro-

ceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but is not entitled to proceed under Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under 28 U. S. C. § 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

PART VIII. DISPOSITION OF CASES

Rule 41. Opinions of the Court

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which

judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U. S. C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

Rule 44. Rehearing

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

Rule 45. Process; Mandates

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by 28 U. S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule

29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

Part IX. Definitions and Effective Date

Rule 47. Reference to "State Court" and "State Law"

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals and the Supreme Court of the Commonwealth of Puerto Rico. See 28 U. S. C. §§ 1257 and 1258. References in these Rules to the common law and statutes of a State include the common law and statutes of the District of Columbia and of the Commonwealth of Puerto Rico.

Rule 48. Effective Date of Rules

1. These Rules, adopted July 26, 1995, will be effective October 2, 1995.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies.

The index and/or table of contents has been removed and photographed separately within this volume year.

For roll film users, this information for the current volume year is at the beginning of the microfilm. For a prior year volume, this information is at the end of the microfilm.

For microfiche users, the index and/or contents is contained on a separate fiche.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1273 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

FOSTER, SHERIFF, ET AL. *v.* GILLIAM ET AL.

ON APPLICATION FOR STAY

No. A–126. Decided August 17, 1995

South Carolina's application for relief from an order of the Court of Appeals, which refused to stay the issuance of a writ of habeas corpus to respondent criminal defendants, is granted in part and denied in part. Respondents claimed double jeopardy by reason of a second trial, which was calendared after the first trial ended in a mistrial over respondents' objection. After the second trial started, the District Court enjoined its continuation and released respondents from custody. Nothing can undo the interruption of the state trial, and therefore the District Court's order staying those proceedings will not be stayed. However, the State has met the traditional criteria for a stay of the enlargement of a prisoner in a habeas proceeding. Therefore respondents' enlargement will be stayed pending disposition of the State's appeal from the District Court's order.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The State of South Carolina seeks relief from an order of the Court of Appeals for the Fourth Circuit, in which that court refused to stay the issuance of a writ of habeas corpus to respondents, defendants in criminal proceedings in South Carolina. The State asks that I stay the District Court's order and allow the State to resume its prosecution of respondents, and stay the enlargement of respondents pending appellate review of their habeas corpus petition.

Respondents were prosecuted in South Carolina state court in 1994 on charges of murder and lynching. During the trial, confusion and dispute arose over whether particular photographs that had been seen by the jury during a luncheon recess had actually been admitted into evidence or were merely marked for identification. The prosecuting attorney's motion for a mistrial was granted by the trial court over respondents' objection, and the trial court calendared the case for a second trial starting July 17, 1995. Between the first and the second trial, the trial court denied a motion by respondents to dismiss the charges on grounds of double jeopardy, and the Supreme Court of South Carolina dismissed respondents' appeal without ruling on its merits.

Respondents then sought habeas relief in federal court under 28 U. S. C. § 2254, and sought to enjoin the imminent second trial pending final disposition of their habeas petition. On July 11, 1995, six days before the second trial was to start, the District Court for the District of South Carolina refused to issue an injunction, and a panel of the Court of Appeals affirmed the District Court's determination four days later, with one judge in dissent. On July 20, three days into the trial, the Court of Appeals en banc granted respondents' request for a temporary restraining order, enjoined the state proceedings until the District Court ruled on respondents' habeas petition, and ordered the District Court to rule on the petition as expeditiously as possible. The State did not apply for a stay of the Court of Appeals' order at this time.

The very next day, the District Court, having held an 8-hour hearing to investigate respondents' double jeopardy claim, granted respondents' petition for a writ of habeas corpus. (This order, though entered July 21, was not reduced to writing for another week.) The District Court denied the State's application to stay the issuance of the writ on July 31, and the Court of Appeals denied a similar application on August 8. The State then made the application before me now.

However debatable may have been the justification for the Court of Appeals' July 20 order enjoining the continuation of a state criminal trial that had already begun, the trial was interrupted as of that date, and the State sought no relief in this Court from the order of the Court of Appeals. Nothing I do now, several weeks later, can undo the interruption of the state trial, and I therefore decline to stay the District Court's order granting habeas relief to the extent that it enjoins the resumption of the state trial proceedings.

That portion of the District Court's order releasing respondents from custody, however, seems to me to stand on a different footing, and I believe that the State has met the traditional criteria for a stay of the enlargement of a prisoner in a habeas corpus proceeding. The state trial court ruled against respondents' double jeopardy claims on the merits. In *Arizona* v. *Washington,* 434 U. S. 497 (1978), we held that one claiming double jeopardy by reason of a second trial must show that there was no "manifest necessity" for the trial court to grant the State's mistrial motion. And we stated that the trial court's judgment about the necessity is entitled to great deference, never more so than when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors. *Id.,* at 513–514. *Washington* indicates that the State will be able to present at the least a substantial case on the merits on appeal, and the other traditional factors in a stay analysis counsel in favor of continued custody. See *Hilton* v. *Braunskill,* 481 U. S. 770, 777–778 (1987) (discussing the circumstances in which a stay of enlargement should be granted under Federal Rules of Appellate Procedure 23(c) and (d), which are virtually identical to this Court's Rules 36.3(b) and 36.4). I will therefore stay the enlargement of respondents under the District Court's July 21 order pending disposition of the State's appeal from that order (now set for argument before the en banc court on September 26) by the Court of Appeals.

Accordingly, the application for stay of enlargement is granted, and the application is otherwise denied.

PENRY *v.* TEXAS

ON APPLICATION FOR EXTENSION OF TIME

No. A-180. Decided August 28, 1995

An application for extension of time in which to file a petition for a writ of certiorari to the Texas Court of Criminal Appeals is denied. The reasons for an extension offered by counsel—a voluminous record below, the breadth of errors committed below, and counsel of record's anticipated absence shortly before the filing date—fall short of what constitutes "good cause" to support such a disfavored application. All applicants would benefit from additional time to prepare a petition for certiorari. It is inconceivable that counsel here could have filed their 375-page Court of Criminal Appeals' brief, detailing 132 allegations of error, without acquiring considerable familiarity with the record. Counsel asked for reconsideration and thus had six months to review the Court of Criminal Appeals' opinion. Finally, counsel's planned absences should affect neither the degree of preparation afforded a client's case nor the orderly administration of this Court's deadlines.

JUSTICE SCALIA, Circuit Justice.

I have before me an application for extension of time in which to file a petition for a writ of certiorari to the Court of Criminal Appeals of Texas. Counsel seek a 59-day extension of the filing deadline "because of the voluminous record below and the breadth of errors that were committed below which warrant review by this Court." Counsel explain: "The petitioner's brief to the Court of Criminal Appeal[s] of Texas discussed 132 points of error and is 375 pages in length. The State's brief is 248 pages in length. The judgment affirming petitioner's conviction and death sentence is 76 pages with 6 additional pages of concurrences." The application offers one additional reason for the extension request: "[C]ounsel of record will be out of his office during the entire week before September 5, 1995—the day that the time to file the petition will expire."

Our Rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment," Rule 13.1, and that a Justice may extend the time to file for up to 60 days "for good cause shown," Rule 13.2. Our Rules specify, however, that "[a]n application to extend the time to file a petition for a writ of certiorari is not favored." Rule 13.6.

I have made it clear that I take the rule of disfavor seriously. In *Madden* v. *Texas*, 498 U. S. 1301 (1991) (opinion in chambers), I considered four applications for extensions of time in capital cases. Three of them sought an extension because appellate counsel had withdrawn from the applicant's case (with no indication that the withdrawal could not reasonably have been foreseen). *Id.*, at 1302–1304. In the fourth, the asserted reason was similar to that offered here: Counsel needed additional time "'to ensure that the important constitutional issues in [the] case are properly researched and presented to this Court.'" *Id.*, at 1302. At that time, I expressed my view that "none of these applications, as an original matter, would meet the standard of 'good cause shown' for the granting of an extension." *Id.*, at 1304. I nonetheless granted extensions in the three cases where counsel had withdrawn, primarily because I was a new Circuit Justice, and was reluctant to impose without notice a standard more stringent, perhaps, than what the Fifth Circuit bar was accustomed to. I gave notice, however, that "I shall not grant extensions in similar circumstances again." *Id.*, at 1305.

By now, counsel litigating in the Fifth Circuit ought to be familiar with my view of what constitutes "good cause" to support the disfavored application to extend the time to file a petition for certiorari. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 6.7 (7th ed. 1993). The reasons offered by counsel in this application fall short. As I have previously observed, all applicants can honestly claim that they would benefit from additional time to prepare a petition for certiorari. *Kleem* v. *INS*, 479 U. S. 1308 (1986) (opinion in chambers); see also *Madden, supra*, at 1304. By their own account, counsel here filed a brief of 375 pages, raising 132 assignments of error, in the Court of Criminal Appeals; it is inconceivable that this could have been achieved without acquiring considerable familiarity with the record, voluminous though it may be. Moreover, counsel sought rehearing below, and thus have had six months to review the opinion of the Court of Criminal Appeals, which discussed in considerable detail the 132 allegations of error as it rejected each of them. Finally—and needless to say—counsel's planned absences should affect neither the degree of preparation afforded a client's case nor the orderly administration of our deadlines.

This is indeed a capital case, but our Rules envision only one "good cause" standard. See 498 U. S., at 1304–1305. Because the applicant here has failed to meet that standard, I deny the application for extension of time.

RODRIGUEZ *v.* TEXAS

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

No. 95–5650 (A–202). Decided August 31, 1995

An application for a stay of execution pending disposition of a petition for writ of certiorari seeking direct review of the Texas Court of Criminal Appeals' judgment is denied, without prejudice to its renewal at a later date. There being no reason to believe that the certiorari petition will not be disposed of well before the scheduled execution date, that date is not likely to interfere with the petition's orderly processing. See *Cole* v. *Texas,* 499 U. S. 1301.

JUSTICE SCALIA, Circuit Justice.

I have before me an application for a stay of execution pending disposition of a petition for writ of certiorari to the Court of Criminal Appeals of Texas. Petitioner seeks direct review of that court's judgment, entered May 17, 1995, affirming his conviction and death sentence. The petition was timely filed on August 15, 1995, and petitioner's application states that he is scheduled to be executed on November 8, 1995.

I have said that "I will . . . in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari." *Cole* v. *Texas,* 499 U. S. 1301 (1991). I have also made clear, however, that the purpose of such a stay is to prevent the execution date from "interfer[ing] with the orderly processing of a petition on direct review by this Court." *Ibid.* In the present case, and at the present time, there is no reason to believe such interference will occur. A petition for certiorari filed in this Court on August 15 will ordinarily be disposed of well before November 8.

Staying the hand of state justice is no small matter, and should not be considered when no need exists. Accordingly, the application for stay is denied, without prejudice to its renewal at a later date.

McGRAW-HILL COS., INC. *v.* PROCTER & GAMBLE CO. ET AL.

ON APPLICATION FOR STAY

No. A–276. Decided September 21, 1995

An application to stay a District Court order restraining petitioner from publishing a magazine article disclosing documents filed under seal with that court is denied. Since it appears that the order was entered without notice to petitioner and was not supported by the findings required by Federal Rule of Civil Procedure 65(b), it can be assumed that the court would have dissolved the order had petitioner so moved. Had it refused to do so, the Court of Appeals would have had jurisdiction to address the restraint's merits. Instead, petitioner filed an expedited appeal, which the Court of Appeals dismissed on jurisdictional grounds. The stay application addresses the merits of the District Court's order, not the Court of Appeals' jurisdictional holding. Even if there is jurisdiction to pass on the order's merits, the wiser course is to give the District Court an opportunity to find the relevant facts—since there is a dispute over how petitioner acquired the documents—and allow both it and the Court of Appeals to consider the merits of the First Amendment issue before it is addressed here.

JUSTICE STEVENS, Circuit Justice.

On September 19, 1995, petitioner, the publisher of Business Week magazine, filed with me in my capacity as Circuit Justice for the Sixth Circuit a hastily prepared document entitled "Application to Stay Restraining Order Pending Certiorari." The caption of the document recites: "On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit." The conclusion of the document asks me to stay the "outstanding prior restraint" against petitioner effected by an order entered by the United States District Court for the Southern District of Ohio, Western Division, on September 13. That order restrains petitioner from publishing an article containing "any disclosure of documents filed under seal, or the contents thereof, without the prior consent" of the District Court. Petitioner requests that a stay of the District Court order "be granted pending its filing of and this Court's ultimate determination of a petition for a writ of certiorari."

It appears that the District Court order of September 13 was entered without notice to petitioner and that it was not supported by the findings of fact required by Rule 65(b) of the Federal Rules of Civil Procedure. I assume, therefore, that if petitioner had filed a prompt motion to dissolve the order, the District Court would have granted that relief, or if it had refused to do so, the Court of Appeals would have had jurisdiction to address the merits of the restraint. Petitioner, however, filed an expedited appeal in the Sixth Circuit, and, on September 19, that court dismissed the appeal on the ground that it did not have jurisdiction to review the merits of the restraining order.

The stay application that petitioner has filed with me indicates that it will seek review by writ of certiorari of the Court of Appeals' jurisdictional holding, but the arguments advanced in the application address the merits of the District Court's order. The application does not explain why there is a substantial basis for concluding that the Court of Appeals erred, or that four Justices of this Court would grant certiorari to review the jurisdictional issue. Moreover, a stay is not necessary to preserve this Court's jurisdiction to review the Court of Appeals' decision; indeed, if the requested stay were granted, any possible review of that decision would probably become moot.

In its discussion of the merits of the District Court's order, petitioner explains that the documents whose contents it wants to publish were attachments to a motion filed by Procter & Gamble in the District Court on September 1, 1995. Referring to that motion, petitioner states:

> "The motion was not filed under seal with the district court and there is no indication anywhere on the motion itself that any of the described attachments were being

> filed under seal." Application to Stay Restraining Order Pending Certiorari 4.

That statement appears to have been intended to give me the impression that petitioner's agents obtained knowledge of the contents of the attachments either (1) without any notice that they were filed under seal, or (2) under the legitimate belief that their filing in court without any effort to preserve their confidentiality had the effect of placing their contents in the public domain. The memoranda filed in opposition to the stay application indicate that I may have been misled by the foregoing statement and that disputed issues of fact should be resolved before expressing an opinion on the important constitutional issue that petitioner argues in its stay application. The statement that I have quoted above seems to acknowledge that the manner in which petitioner came into possession of the information it seeks to publish may have a bearing on its right to do so.

Even if I have jurisdiction to pass on the merits of the District Court's order of September 13—a matter which is doubtful at best—I am satisfied that the wiser course is to give the District Court an opportunity to find the relevant facts, and to allow both that court and the Court of Appeals to consider the merits of the First Amendment issue before it is addressed in this Court. The stay application is, accordingly, denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1992, 1993 AND 1994

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1992	**1993**	**1994**	**1992**	**1993**	**1994**	**1992**	**1993**	**1994**	**1992**	**1993**	**1994**
Number of cases on dockets	12	12	11	2,441	2,442	2,515	4,792	5,332	5,574	7,245	7,786	8,100
Number disposed of during term	1	1	2	2,099	2,065	2,154	4,256	4,616	4,976	6,356	6,682	7,132
Number remaining on dockets	11	11	9	342	377	361	536	716	598	889	1,104	968

	TERMS		
	1992	**1993**	**1994**
Cases argued during term	116	99	94
Number disposed of by full opinions	111	93	91
Number disposed of by per curiam opinions	[1] 4	6	3
Number set for reargument	0	0	0
Cases granted review this term	100	[2] 99	96
Cases reviewed and decided without oral argument	109	[3] 70	[4] 69
Total cases to be available for argument at outset of following term	46	[2] 40	39

[1] Does not include No. 91–2086, dismissed per Rule 46, April 12, 1993.

[2] Includes 93–714, suggestion of mootness.

[3] Includes 92–6259, denied June 14, 1993.

[4] Includes S–1.

JUNE 29, 1995

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CIVIL RIGHTS ACT OF 1871.

1. *Section 1983—Qualified-immunity defense—Appeal.*—Five named police officers, who were entitled to invoke a qualified-immunity defense in this constitutional tort action under 42 U. S. C. § 1983, could not immediately appeal District Court's summary judgment order insofar as that order determined whether pretrial record set forth a "genuine" issue of fact for trial. Johnson v. Jones, p. 304.

2. *Section 1983—Relief in state tax cases.*—Congress did not authorize state courts to issue injunctive or declaratory relief under 42 U. S. C. § 1983 in state tax cases when there is an adequate state-law remedy. National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, p. 582.

COAST GUARD COURT OF MILITARY REVIEW. See **Constitutional Law**, I.

CONGRESSIONAL REDISTRICTING. See **Constitutional Law**, IV, 1; **Standing to Sue.**

CONSECUTIVE SENTENCES. See **Habeas Corpus.**

CONSTITUTIONAL LAW. See also **Standing to Sue.**

I. Appointments Clause.

Composition of Coast Guard Court of Military Review—Civilian judges.—Court of Military Appeals, after finding that appointment of civilian judges to Coast Guard Court of Military Review violated Appointments Clause, erred in according *de facto* validity to those judges' actions. Ryder v. United States, p. 177.

II. Double Jeopardy.

United States Sentencing Guidelines—Consideration of conduct underlying previous sentence.—A court does not violate Double Jeopardy Clause's prohibition against multiple punishments for same offense by sentencing a defendant for a crime, using Guidelines, when conduct underlying that offense has been considered in determining his sentence for a previous conviction. Witte v. United States, p. 389.

III. Due Process.

Inmate lawsuit—Liberty interest.—Neither a Hawaii prison disciplinary regulation nor Due Process Clause itself afforded Conner a protected liberty interest in remaining free of disciplinary segregation that would have entitled him to procedural protections set forth in *Wolff* v. *McDonnell*, 418 U. S. 539. Sandin v. Conner, p. 472.

IV. Equal Protection of the Laws.

1. *Congressional redistricting plan—Race-based decisionmaking.*—Georgia's new congressional redistricting plan violates Equal Protection

CONSTITUTIONAL LAW—Continued.

Clause as interpreted in *Shaw* v. *Reno,* 509 U. S. 630. Miller v. Johnson, p. 900.

2. *Federal contractor selection—Racial classification—Standard of review.*—Racial classifications imposed by a federal, state, or local governmental actor must be analyzed by a reviewing court under strict scrutiny and will be found constitutional only if they are narrowly tailored to further compelling governmental interests. Adarand Constructors, Inc. v. Peña, p. 200.

V. Establishment of Religion.

Public forum—Display of religious symbol.—Sixth Circuit's holding that a private, unattended, religious symbol displayed in a public forum next to Ohio's state capitol cannot violate Establishment Clause, even though uninformed observers might misperceive state endorsement, is affirmed. Capitol Square Review and Advisory Bd. v. Pinette, p. 753.

VI. Freedom of Speech.

1. *Attorney advertising—Direct-mail solicitations.*—Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster do not violate First and Fourteenth Amendments. Florida Bar v. Went For It, Inc., p. 618.

2. *Disbursement of university's student activities fund—Funding of religious student newspaper.*—A state university's refusal to fund from its student activities fund a student newspaper solely because of its religious editorial viewpoint violates First Amendment's Free Speech Clause and is not excused by necessity of complying with Establishment Clause. Rosenberger v. Rector and Visitors of Univ. of Va., p. 819.

3. *Public accommodations law—Private citizens' parade—Admission of parade contingents.*—Massachusetts courts' application of Commonwealth's public accommodations law to require private citizens who organize Boston's St. Patrick's Day Parade to include among marchers a group formed to celebrate its members' homosexuality violates First Amendment. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., p. 557.

VII. Right to Jury Determination of Guilt.

Materiality of false statements—Judge's refusal to submit question to jury.—Refusal of judge at Gaudin's trial under 18 U. S. C. § 1001 to submit to jury question whether his alleged false statements on federal loan documents were "material" violated his Fifth and Sixth Amendment right to have a jury determine, beyond a reasonable doubt, his guilt of every element of crime with which he was charged. United States v. Gaudin, p. 506.

CONSTITUTIONAL LAW—Continued.

VIII. Searches and Seizures.

Drug testing—Student athletes.—Oregon school district's policy authorizing random urinalysis drug testing of student athletes does not violate Fourth and Fourteenth Amendments. Vernonia School Dist. 47J v. Acton, p. 646.

CREDIT FOR TIME SERVED. See **Sentences.**

CRIMINAL LAW. See also **Constitutional Law,** II; VII; **Habeas Corpus; Stays,** 1, 3, 4.

Obstruction of justice—Disclosure of wiretap.—Obstruction of justice, as prohibited by 18 U. S. C. § 1503, does not include making false statements to potential grand jury witnesses, but disclosure of a wiretap after its authorization expires violates § 2232(c). United States v. Aguilar, p. 593.

CROSS DISPLAYED ON PUBLIC PROPERTY. See **Constitutional Law,** V.

DECLARATORY JUDGMENT ACTIONS. See **Jurisdiction.**

DESEGREGATION. See **Remedies.**

DIRECT-MAIL SOLICITATIONS BY ATTORNEYS. See **Constitutional Law,** VI, 1.

DISABILITY BENEFITS. See **Longshore and Harbor Workers' Compensation Act.**

DISCLOSURE OF WIRETAPS. See **Criminal Law.**

DISTRICT COURTS. See **Remedies.**

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DRUG TESTING. See **Constitutional Law,** VIII.

DUE PROCESS. See **Constitutional Law,** III; VII.

EDUCATION. See **Remedies.**

EMPLOYER AND EMPLOYEES. See **Federal Employees Liability Reform and Tort Compensation Act of 1988; Longshore and Harbor Workers' Compensation Act.**

ENDANGERED SPECIES ACT OF 1973.

Taking of species—Habitat modification.—Act's prohibition against taking any member of an endangered or threatened species includes a "significant habitat modification or degradation where it actually kills wildlife." Babbitt v. Sweet Home Chapter, Communities for Great Ore., p. 687.

ENVIRONMENTAL LAWS. See **Endangered Species Act of 1973.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** V; VI, 2.

EXCISE TAXES. See **Taxes,** 2.

EXECUTIONS. See **Stays,** 3, 4.

EXTENSIONS OF TIME. See **Supreme Court,** 4.

FALSE STATEMENTS ON FEDERAL LOAN DOCUMENTS. See **Constitutional Law,** VII.

FALSE STATEMENTS TO POTENTIAL GRAND JURY WITNESSES. See **Criminal Law.**

FEDERAL CONTRACTS. See **Constitutional Law,** IV, 2.

FEDERAL DISTRICT COURTS. See **Remedies.**

FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988.

Scope-of-employment certification—Reviewability.—Attorney General's certification, pursuant to Act, that an employee sued for a wrongful or negligent act was acting within scope of his office at time of incident out of which claim arose—which ordinarily causes a Government employee to be dismissed from suit—is subject to judicial review. Gutierrez de Martinez v. Lamagno, p. 417.

FEDERAL EMPLOYER AND EMPLOYEES. See **Federal Employees Liability Reform and Tort Compensation Act of 1988.**

FEDERAL INCOME TAXES. See **Taxes,** 1.

FEDERAL LOAN DOCUMENTS. See **Constitutional Law,** VII.

FEDERAL-STATE RELATIONS. See **Jurisdiction.**

FIFTH AMENDMENT. See **Constitutional Law,** II; IV, 2; VII.

FIRST AMENDMENT. See **Constitutional Law,** V; VI; **Stays,** 2.

FLORIDA. See **Constitutional Law,** VI, 1.

FOREIGN ARBITRATION CLAUSES. See **Carriage of Goods by Sea Act.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** IV, 1; VI, 1; VIII.

FOURTH AMENDMENT. See **Constitutional Law,** VIII.

FREEDOM OF SPEECH. See **Constitutional Law,** VI; **Stays,** 2.

FUEL EXCISE TAXES. See **Taxes,** 2.

FUNDING OF RELIGIOUS STUDENT NEWSPAPERS. See **Constitutional Law,** VI, 2.

GEORGIA. See **Constitutional Law,** IV, 1.

GOVERNMENT CONTRACTS. See **Constitutional Law,** IV, 2.

HABEAS CORPUS. See also **Stays,** 1.

Consecutive sentences—Challenge to sentence already served.—Prisoners incarcerated under consecutive state-court sentences remain "in custody" on all of those sentences until all are served, and so they may apply for federal habeas relief from those sentences in series that they have already served. Garlotte v. Fordice, p. 39.

HABITAT MODIFICATION. See **Endangered Species Act of 1973.**

HAWAII. See **Constitutional Law,** III.

IMMUNITY FROM SUIT. See **Civil Rights Act of 1871,** 1.

INCOME TAXES. See **Taxes,** 1.

"IN CUSTODY." See **Habeas Corpus.**

INDIANS. See **Taxes,** 2.

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JURISDICTION. See also **Civil Rights Act of 1871,** 1.

Declaratory judgment action—Federal jurisdiction—Pending state-court proceedings—Standard of review.—Discretionary standard of *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, governs a district court's decision to stay a federal declaratory judgment action during pendency of parallel state-court proceedings; that decision should be reviewed for abuse of discretion. Wilton v. Seven Falls Co., p. 277.

KU KLUX KLAN. See **Constitutional Law,** V.

LAWYER ADVERTISING. See **Constitutional Law,** VI, 1.

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LIMITATIONS PERIODS. See **Worker Adjustment and Retraining Notification Act.**

LIQUIDATED DAMAGES. See **Taxes,** 1.

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Modification of disability award.—A disability award under Act may be modified under §22 of Act where there is a change in an employee's wage-earning capacity, even without any change in employee's physical condition. Metropolitan Stevedore Co. v. Rambo, p. 291.

LOUISIANA. See **Standing to Sue.**

MARITIME LAW. See **Admiralty; Carriage of Goods by Sea Act.**

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MATERIALITY AS A JURY QUESTION. See **Constitutional Law,** VII.

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PRISONER LAWSUITS. See **Constitutional Law,** III.

PROCEDURAL DUE PROCESS. See **Constitutional Law,** III.

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PUBLIC SCHOOL DESEGREGATION. See **Remedies.**

PUBLIC UNIVERSITY'S FUNDING OF RELIGIOUS STUDENT NEWSPAPERS. See **Constitutional Law,** VI, 2.

QUALIFIED IMMUNITY FROM SUIT. See **Civil Rights Act of 1871,** 1.

RACIAL CLASSIFICATIONS. See **Constitutional Law,** IV, 2.

RACIAL GERRYMANDERING. See **Constitutional Law,** IV, 1; **Standing to Sue.**

REDISTRICTING. See **Constitutional Law,** IV, 1; **Standing to Sue.**

RELIGIOUS STUDENT NEWSPAPERS. See **Constitutional Law,** VI, 2.

RELIGIOUS SYMBOL DISPLAYED ON PUBLIC PROPERTY. See **Constitutional Law,** V.

REMEDIES.

Desegregation of schools—District Court's authority.—In this school desegregation case, District Court exceeded its authority in ordering Missouri to fund salary increases for virtually all staff in Kansas City School District and to continue to fund remedial "quality education" programs in that district. Missouri v. Jenkins, p. 70.

RESTRAINING ORDERS. See **Stays,** 2.

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RIPARIAN RIGHTS.

North Platte River—Exceptions to Special Master's Report.—Exceptions by Nebraska, Wyoming, and United States to Special Master's Third Interim Report in litigation concerning disputes over allocation of North Platte River flows are overruled. Nebraska v. Wyoming, p. 1.

ST. PATRICK'S DAY PARADES. See **Constitutional Law,** VI, 3.

SCHOOL DESEGREGATION. See **Remedies.**

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SECTION 1983. See **Civil Rights Act of 1871.**

SENTENCES. See also **Constitutional Law,** II; **Habeas Corpus.**

Credit for time served—Time spent at a community treatment center.—Koray was not entitled to a sentence credit for time he was ordered to spend at a community treatment center while released on bail under Bail Reform Act of 1984, because such time was not "official detention" within meaning of 18 U. S. C. § 3585(b). Reno v. Koray, p. 50.

SENTENCING GUIDELINES. See **Constitutional Law,** II.

SIXTH AMENDMENT. See **Constitutional Law,** VII.

SOUTH CAROLINA. See **Stays,** 1.

STANDING TO SUE.

Congressional redistricting plan—Appellees' residence.—Appellees lack standing to challenge constitutionality of Louisiana's congressional redistricting plan because they do not live in minority-majority district that is primary focus of their racial gerrymandering claim. United States v. Hays, p. 737.

STATE-COURT SUIT AS AFFECTING FEDERAL-COURT JURISDICTION. See **Jurisdiction.**

STATE ENDORSEMENT OF RELIGION. See **Constitutional Law,** V; VI, 2.

STATE-LAW REMEDIES. See **Civil Rights Act of 1871,** 2.

STATE TAXES. See **Civil Rights Act of 1871,** 2; **Taxes,** 2.

STATUTES OF LIMITATIONS. See **Worker Adjustment and Retraining Notification Act.**

STAYS. See also **Jurisdiction.**

1. *Habeas corpus—Interruption of state trial—Enlargement of respondents.*—South Carolina's request for a stay of District Court's order stopping respondents' state criminal trial and allowing State to resume its prosecution is denied, but its request to stay respondents' enlargement pending appellate review of their habeas petition is granted. Foster v. Gilliam (REHNQUIST, C. J., in chambers), p. 1301.

2. *Order restraining publication of article.*—An application to stay a District Court order restraining petitioner from publishing a magazine article disclosing documents filed under seal with that court is denied. McGraw-Hill Cos. v. Procter & Gamble Co. (STEVENS, J., in chambers), p. 1309.

STAYS—Continued.

3. *Stay of execution pending disposition of certiorari petition.*—Because there is no reason to believe that certiorari petition will not be disposed of before applicant's scheduled execution date, application for stay of execution pending disposition of certiorari petition is denied. Rodriguez v. Texas (SCALIA, J., in chambers), p. 1307.

4. *Stay of execution pending filing of certiorari petition.*—Respondent's 90-day stay of execution was improvidently granted where there is no indication that Court of Appeals undertook inquiry required by *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896. Netherland v. Tuggle, p. 951.

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SUPREME COURT.

1. Notation of the death of Chief Justice Burger (retired), p. v.

2. Rules of the Supreme Court, p. 1195.

3. Term statistics, p. 1312.

4. *Extension of time to file petition for writ of certiorari.*—Counsel's reasons fall short of good cause to support disfavored application for extension of time in which to file a petition for a writ of certiorari. Penry v. Texas (SCALIA, J., in chambers), p. 1304.

TAKING OF ENDANGERED SPECIES. See **Endangered Species Act of 1973.**

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1. *Federal income taxes—Gross income—Exclusion of backpay and liquidated damages.*—Section 104(a)(2) of Internal Revenue Code does not authorize a taxpayer to exclude from gross income amount received in settlement of a claim for backpay and liquidated damages under Age Discrimination in Employment Act of 1967. Commissioner v. Schleier, p. 323.

2. *State motor fuel excise tax—State income tax.*—Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land, but it may impose its income tax upon tribal members employed by Tribe but residing outside Indian country. Oklahoma Tax Comm'n v. Chickasaw Nation, p. 450.

THREATENED SPECIES. See **Endangered Species Act of 1973.**

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UNITED STATES SENTENCING GUIDELINES. See **Constitutional Law,** II.

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VOTING RIGHTS. See **Constitutional Law,** IV, 1; **Standing to Sue.**

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WORDS AND PHRASES.

1. *"In custody."* 28 U. S. C. § 2254(a). Garlotte v. Fordice, p. 39.
2. *"Official detention."* 18 U. S. C. § 3585(b). Reno v. Koray, p. 50.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT.

Statutes of limitations—Use of state law.—State law, not National Labor Relations Act, provides proper source of limitations period for civil actions brought to enforce federal Worker Adjustment and Retraining Notification Act. North Star Steel Co. v. Thomas, p. 29.

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